Supreme Court, U.S.

No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1992

Ann Richards, Governor of Texas; Carol S. Vance, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Clarence N. Stevenson, Allan B. Polunsky, R. H. Duncan, Sr., Gilberto Hinojosa, John R. Ward, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI
Appendices U-II

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APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	
SHERIFF OF HARRIS COUNTY, TEXAS, et al., Defendants/Third-Party Plaintiffs,	§	C. A. No. 72-H-1094
v.	§	
WILLIAM P. CLEMENTS, et al., Third-Party Defendants.	§	

ORDER

Since early 1990, the combined Courts* have searched for some feasible and equitable solution to the overcrowding problem in Harris County detention facilities. After the Alberti Court found conditions in those facilities unconstitutional and both the State and County defendants liable for such conditions, the combined Courts supervised lengthy negotiations among the

*In August, 1989, the U. S. Court of Appeals for the Fifth Circuit issued a writ of mandamus directing the coordination of remedies in the instant case with prior directives of the federal district court in Ruiz v. Lynaugh, 503 Fed. Supp. 1265 (S.D. Tex. 1980); In re William P. Clements, et al., No. 89-2706 (1989). Pursuant to those directions, the Alberti and Ruiz courts have conducted joint hearings on remedial issues and in the Alberti case and issued joint remedial orders.

parties and conducted lengthy hearings on proposed remedial plans. On April 5, 1990, the Courts entered a remedial order imposing a series of progressively reduced caps on the population of the Harris County detention facilities. The order directed the State defendants to remove from Harris County facilities a specific number of convicted felons ready for transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ-ID) and provided for automatic awards of administrative good time to certain limited classes of convicted felons if the State defendants failed to remove the specified number of prisoners. The order also provided for the releases of convicted misdemeanants and pre-trial detainees, commencing with those least likely to pose a threat to public safety, if the County defendants failed to reduce the number of County prisoners to prescribed levels.

That April order lapsed on August 31, 1990, by which time the State defendants had removed the required number of felons ready for transfer to TDCJ-ID. The number of County prisoners exceeded the applicable cap by 254 inmates on August 31, 1990, and releases of pre-trial detainees and misdemeanants occurred in early September. Meanwhile, after further hearings, the combined Courts entered a new remedial order on September 7, 1990. This order extended the existing overall population cap of 6,100 prisoners on the Harris County detention facilities to December 31, 1990, when a further reduction to 6,000 was required. The order also imposed internal caps on the State and County, with the State being limited to 1,350 felons ready for transfer to TDCJ-ID and the County being limited to a total of 4,750 prisoners. As in the previous order, the new mandate provided for expedited awards of good time to accelerate the release on parole of felons and ordered the direct release of certain pre-trial detainees and misdemeanants if the parties were unable to meet their respective internal caps.

Since neither set of defendants was able initially to meet its internal cap, both sought a stay from the combined Courts,

while the State defendants also sought prematurely a stay from the Fifth Circuit Court of Appeals. Hearings before the Alberti Court followed, during which State and County defendants argued for a moratorium on any further releases and sought additional time to develop alternatives other than releases for dealing with the excess population. On October 24, 1990, the combined Courts, without ruling on the defendants' applications for a stay, ordered the parties to meet with the Special Master in the Alberti and Ruiz cases and attempt to generate some acceptable plan for dealing with the population problem that did not rely on releases.

During September and October, 1990, meanwhile, the State and County defendants had expedited their cooperative work on developing, funding and implementing programs for intermediate, alternative sanctions pursuant to House Bill 2335, passed by the Texas Legislature in 1989 to encourage the development of local correctional programs and facilities for felons traditionally sentenced to TDCJ-ID. In early November, the defendants reported significant progress in the development of these programs and the Alberti Court granted the defendants a further extension of 50 days on November 19, 1990 within which to attempt to implement sufficient alternative program plots to reduce the number of felons committed to TDCJ-ID in Harris County detention facilities.

While a substantial number of programs for intermediate sanctions has been created in the intervening 60 days, State District Court judges have only begun to integrate them into regular sentencing patterns. While there has been some reduction in the number of felons committed weekly to Harris County detention facilities for delivery to TDCJ-ID, that number continues to exceed the number of felons removed from Harris County detention facilities weekly through transfer to TDCJ-ID or released on parole by an average of some 50 prisoners. According to statistics provided to the court by the County defendants through the Special Master, the total population of prisoners in Harris county detention facilities on January 21,

1991 was 6,715, 715 prisoners over the currently applicable overall population cap of 6,000. With the excess of commitments over removals running at an average of 50 a week, we can anticipate a monthly increase in total population of some 215, assuming, of course, that the County defendants manage to hold their numbers in check. If that rate of growth continues, we are looking at numbers in excess of 7,300 within the next 50 days, unless steps are taken forthwith to limit or reduce the population. In hearings in August, 1990, both the Alberti Special Master and the State defendants' expert testified that Harris County detention facilities could probably be managed safely and securely for a limited period at a population level somewhere between 5,500 and 6,000. Even more alarming is the specter that, if the current numbers continue unabated, the County prisoner population will exceed the County's design capacity within 30 days of the opening of its new 4,000-bed 701 Building scheduled to be ready for occupancy on September 1, 1991.

In the long term, probably the best hope for County and State defendants alike is a rapid expansion in the utilization of intermediate sanctions developed pursuant to HB 2335. The Count defendants have proven themselves capable of creating the programs needed for such sanctions, but the reluctance of State District Court judges to use them is beyond the reach of the federal court in this case. But let no one be misled by the consequences of sate judges' preference for prison sentences and their disregard for alternative sanctions. It is no great blow for law and order to send so many offenders to prison that the only way the State can handle them is to accelerate their release. Present policies and practices are making a mockery of criminal sanctions and churning people through the prison system so rapidly, there is scarcely any sanction at all. The result is the increasingly widespread erosion of public confidence in the criminal justice system. The furor last September over releases in Harris County was simply symptomatic of a much deeper, growing public anger.

The State defendants, meanwhile, after earlier appealing the November 19, 1990 Order that gave parties an additional 60 days to develop alternatives, have now filed a motion seeking to extend that same order. February marks the 39th month, dating from September, 1988 since the Alberti Monitors identified the overflow of felons ready for transfer to TDCJ-ID as a serious problem contributing substantially to unconstitutional conditions in Harris County detention facilities. The time for further delay has passed and the State defendants' motion is denied.

The next construction milestone for the County defendants comes at the end of April, 1991, when they are due to open a boot camp for 382 prisoners and a residential probation facility for 192 convicted offenders. Recognizing the State and County defendants' efforts to expand both the implementation and use of intermediate sanctions pursuant to HB 2335, the need to avoid further direct releases or releases accomplished through the further acceleration of parole; and the existence of pending litigation in the state courts over the allocation of responsibility and costs for the maintenance of felons ready for transfer to TDCJ-ID in county detention facilities. What is called for is a short-term remedial decrees that is designed to bridge the gap between the present and the next construction milestone, which leaving room for the State and County defendants to continue and expand their present separate and joint efforts to contain their respective populations, but one that also sets some limits on immediate overall population growth and provides tools for addressing continued overcrowding. None of the remedial measures encompassed in this order affect the population cap imposed on TDCJ institutions as a result of the various orders and agreements in the Ruiz case, nor do they require the supersedence of the statutorily-based allocation formula adopted by the State defendants to protect the integrity of the Ruiz orders and agreements.

It is therefore ORDERED:

1. This remedial decree supersedes all previous remedial orders in this case, and shall remain in effect until May 1, 1991.

2. The overall population of Harris County detention facilities shall be reduced to 6,300 within 45 days of the entry of this order. Within that overall cap, the County population shall not exceed 4725, or 75 percent of the overall population, and shall include convicted felons not ready for transfer to TDCJ-ID and parole violators. The population of convicted felons in Harris County detention facilities ready for transfer to TDCJ-ID shall not exceed 1575, or 25 percent of the overall population.

3. If necessary to meet the overall population cap of 6,300 described in paragraph 2, above, the Sheriff of Harris County shall transfer prisoners ready for transfer to TDCJ-ID with sentences of from five to no more than 15 years in groups of 25 inmates to other Texas county detention facilities identified and selected by the Sheriff. Any such felons transferred to other county detention facilities shall continue to be Harris County prisoners until they are released on parole in absentia (PIA), or moved to a pre-parole transfer program (PPT) or transferred to TDCJ-ID under Harris County's weekly allocation.

4. The State defendants shall deposit in the Registry of the Alberti Court $750,000.00 by March 20, 1991, from which the County defendants shall be authorized to pay up to $40.00 per diem for each transferred inmate. The county expenditures shall be reimbursed from this fund upon application to the court and upon approval and order of payment by the court. If this initial fund is exhausted prior to the expiration of this Order, the Court shall direct such additional deposits as may be necessary to carry out the terms of the Order. The County defendants shall pay the costs of transportation. If the County population exceeds its internal cap of 4,725 prisoners, the County defendants shall be required to pay the per diem cost for each prisoner in excess of the 4,725-cap on any one day,

although only TDCJ-ID-ready felons shall actually be transferred. Thus, for example, if the County population on a given day is 4,750, the County defendants shall be responsible for paying the per diem for 25 of the TDCJ-ID ready felons transferred to other county jails on that day.

This assessment of costs is tentative and preliminary and shall be reevaluated and finalized contingent on (1) the outcome of pending litigation in State courts over the allocation of costs for maintaining felons ready for transfer to TDCJ-ID in county facilities; and (2) the extent to which HB 2335 alternatives are implemented in Harris County and the number of felons committed to TDCJ-ID is reduced. The County defendants shall file a bond for $750,000.00 with the Registry of the Alberti Court by March 20, 1991 in the event that the State defendants prevail on the issue of cost allocation in the pending State litigation.

5. The County defendants shall continue to be required to do everything necessary to occupy the new 701 building by September 1, 1991. They shall continue to provide funding for and conduct the recruitment, hiring and training of staff to operate the 701 Building. The County defendants shall be assessed a substantial daily fine for each day beyond September 1, 1991 they fail to occupy the 701 Building. "Occupy" in this context refers to the housing of a substantial number of prisoners, not a token contingent.

6. The County defendants shall staff and occupy the new boot camp at the Detention Center in Humble and the residential probation program in the 701 Building by April 15, 1991.

7. The County and State defendants shall continue to cooperate to expand and implement intermediate sanctions pursuant to HB 2335. The County defendants shall take all measures required to keep State District Court judges knowledgeable about the nature and availability of these sanctions.

8. Between the date of the entry of this order and May 1, 1991, the State defendants shall maintain the current allocation formula for admissions to TDCJ-ID pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4. That proportional share of admissions to TDCJ-ID shall apply to all additional capacity that becomes available during the period covered by this order. The State defendants may take any other steps consonant with State law and federal court orders to reduce the TDCJ-ID ready population in Harris County detention facilities.

9. The County defendants shall compile and submit to the State defendants every ten days a list of prisoners potentially eligible for parole in absentia (PIA) or pre-parole transfer (PPT) together with the necessary paperwork on each identified prisoner. The County defendants shall be responsible for forwarding the necessary paperwork on eligible prisoners within ten days of their receipt of the requisite paperwork from courts or prosecutors. The State defendants shall take final action on parole within 45 days of receiving notification from all personnel that a prisoner is eligible, together with the receipt of all necessary paperwork. The period of time consumed by the "Notice to Trial Officials" procedures shall not be included in this 45-day time limit. The State defendants shall be required to take final action on prisoners eligible for PPT within 45 days subject to the availability of PPT beds.

10. The Court specifically retains jurisdiction over this matter.

SIGNED this 7th day of February, 1991, at Houston, Texas.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
Plaintiffs,	§	
vs.	§	
JOHNNY KLEVENHAGEN, et al.,	§	C. A.
	§	No. 72-H-1094
Defendants.	§	
vs.	§	
WILLIAM P. CLEMENTS, et al.,	§	
Third-Party Defendants.	§	

ORDER

On April 5, 1990, the Court entered a remedial order in this case that established an immediate cap of 6,700 inmates at the Harris County detention facilities, and caps of 6,400 by May 15, 1990, and 6,100 by August 31, 1990. That order imposed an obligation on the State defendants to take a specific number of prisoners ready for transfer to the Texas Department of Criminal Justice - Institutional Division (TDCJ-ID) and provided that if the State defendants failed to take that number of prisoners, automatic awards of administrative good time would be made to certain carefully limited classes of convicted felons. Likewise, the order provided for releases of certain categories of convicted misdemeanants and pre-trial detainees, commencing with those least likely to present a threat to the public safety, in the event

that the mandated steps by the County defendants failed to reduce the number of prisoners to levels specified in the order.

As a consequence of that order, the number of prisoners held in Harris County detention facilities was substantially reduced, without the necessity of making any awards of administrative good time. On August 13, 1990, the total population of Harris County detention facilities was 6,097, or 30 percent over their design capacity. The number of felons ready for transfer to TDCJ-ID fell from 3,420 on July 31, 1989 to 1,069 on July 31, 1990. The total smaller population, moreover, occupied increased cellspace, because the newly renovated 301 Building opened on December 2, 1989, raising the capacity of Harris County detention facilities by 417 to a new total of 4,698 beds.

On August 14 and 15, 1990, the Court held hearings to review the defendants' progress in meeting the requirements of the April 5, 1990 Order and consider whether and what further remedial actions might be appropriate. The County defendants informed the court that its latest construction project, the so-called 701 Building, a cold storage warehouse in downtown Houston currently being converted into a 4,000-bed jail, and a new central intake center for the processing of all prisoners on entry into Harris County Sheriff's Department, will be ready for occupancy by September 1, 1991. This date is critical in this case because these new facilities will permit the County to handle up to 8,698 prisoners, which, in combination with programs for alternatives to incarceration being developed under House Bill 2335, portends an end to the correctional crisis that has plagued Harris County for over 15 years.

The problem the court must address now is how best to bridge the next 12 months. The Special Master in the Alberti case testified that, while some further population reductions are necessary, the County's institutions could probably be managed safely and securely for a limited period at a population level somewhere between 5,500 and 6,000. The State defendants' expert witness concurred. The task then is to assure first that the

September 1991 target date for the opening of the 701 Building is fixed firmly and irrevocably and, second, to keep the population of Harris County detention facilities within acceptable limits for the next 12 months. Accordingly, the following remedial measures are hereby ordered and directed:

1. The County defendants shall occupy the new 701 Building by no later than September 1, 1991. They shall provide funding for, and begin, the recruitment, hiring and training of staff to operate the 701 Building by no later than September 30, 1990. The County defendants shall be assessed a substantial daily fine for each day beyond September 1, 1991 they fail to occupy the 701 Building. "Occupy" in this context refers to the housing of a substantial number of prisoners, not a token contingent.

2. Upon the entry of this order, the overall population of Harris County detention facilities shall not exceed 6,100 prisoners.

3. The overall population of Harris County detention facilities shall be reduced to 6,000 by December 31, 1990.

4. The population of prisoners ready for transfer from Harris County detention facilities to TDCJ-ID shall not exceed 1,350 between the entry of this order and September 1, 1991. For the purpose of this order, a prisoner ready for transfer to TDCJ-ID is an individual who has been convicted of a felony and sentenced, and whose immediate transfer to TDCJ-ID would be in compliance with section 8 of article 42.09 of the Texas Code of Criminal Procedure.

5. Between the date of the entry of this order and September 1, 1991, the State defendants shall maintain the current allocation formula for admissions to TDCJ-ID pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4. That proportional share of admissions to TDCJ-ID shall apply to all additional capacity that becomes available during the period covered by this order.

6. The County defendants shall compile and submit to the State defendants every ten days a list of prisoners potentially eligible for parole in absentia (PIA) or pre-parole transfer (PPT) together with the necessary paperwork on each identified prisoner. The County defendants shall be responsible for forwarding the necessary paperwork on eligible prisoners within ten days of their receipt of the requisite paperwork from courts or prosecutors. The State defendants shall take final action on parole within 45 days of receiving notification from all personnel that a prisoner is eligible, together with the receipt of all necessary paperwork. The period of time consumed by the "Notice to Trial Officials" procedures shall not be included in this 45-day time limit. The State defendants shall be required to take final action on prisoners eligible for PPT within 45 days subject to the availability of PPT beds.

7. Whenever the number of prisoners in Harris County detention facilities ready for transfer to TDCJ-ID exceeds 1,350 for 15 consecutive days, awards of administrative good time pursuant to this order shall be made only to those prisoners in Harris County detention facilities ready for transfer TDCJ-ID who have already been identified as eligible for consideration for either PIA or PPT, and whose names and paperwork have been submitted by the County defendants, other than the following: (1) prisoners who are serving a sentence for an offense for which the judgment contains an affirmative finding under Subdivision (2) of Subsection (a) of section 3g, article 42.12, Texas Code of Criminal Procedure; (2) prisoners who are serving a sentence for an offense listed in one of the following sections of the Texas Penal Code: (A) section 19.02 (murder); (B) section 19.03 (capital murder); (C) section 19.04 (voluntary manslaughter); (D) section 20.03 (kidnapping); (E) section 20.04 (aggravated kidnapping); (F) section 21.11 (indecency with a child); (G) section 22.011 (sexual assault); (H) section 22.021 (aggravated sexual assault); (I) section 22.03 (deadly assault on law enforcement or corrections officer or court participant); (J) section 22.04 (injury to child or an elderly individ-

ual); (K) section 25.02 (incest); (L) section 25.06 (solicitation of a child); (M) section 25.11 (sale or purchase of a child); (N) section 28.02 (arson); (O) section 29.02 (robbery); (P) section 29.03 (aggravated robbery); (Q) section 30.02 (burglary), if the offense is punished as a first degree felony under that section; (R) section 43.04 (aggravated promotion of prostitution); (S) section 43.05 (compelling prostitution); (T) section 43.24 (sale, distribution, or display of harmful material to minor); (U) section 43.25 (sexual performance by a child); (V) section 46.11 (deadly weapon in penal institution); (W) section 15.01 (criminal attempt), if the offense attempted is listed in this paragraph; (X) section 15.02 (criminal conspiracy), if the offense that is the subject of this conspiracy is listed in this paragraph; or (Y) section 15.03 (criminal solicitation), if the offense solicited is listed in this paragraph; and (3) prisoners who are serving a sentencing for an offense listed in section 4.03(c) or 4.032(c) (aggravated manufacture or delivery of a controlled substance), section 4.04(c), 4.041(c), 4.042(c), or 4.043(c) (aggravated possession of a controlled substance), section 4.05 (delivery of marijuana) if the offense is punished under Subsection (b)(5) of that section, section 4.05(c) (aggravated delivery of marijuana), or section 4.051(c) (aggravated possession of marijuana) of the Texas Controlled Substance Act (article 4476-15, Vernon's Texas Civil Statutes).

In the event that awards of administrative good time are required to achieve the limit on the number of prisoners ready for transfer to TDCJ-ID in Harris County detention facilities, sufficient administrative good time shall be awarded to eligible prisoners to reduce the number of such prisoners to 1,350 within a reasonable time. If the initial award of administrative good time does not suffice to reduce the number of prisoners awaiting transfer to TDCJ-ID to 1,350 within a reasonable time, additional increments of administrative good time shall continue to be awarded to all eligible prisoners until the required cap has been reached. The Alberti Special Master shall apprise the court if awards of administrative good time are required by this paragraph and shall recommend the number of days to be

awarded. Any awards shall be ordered by the Alberti court. The State and County defendants shall cooperate to develop an orderly process for the identification of prisoners eligible for additional good time and provide that information to the Special Master. The State and County defendants shall not be in contempt of this order if, despite compliance with all aspects of this order, the acceleration of administrative good time as directed in this paragraph fails to achieve the required cap.

8. The population of prisoners in Harris County detention facilities, exclusive of those ready for transfer to TDCJ-ID, shall not exceed 4,750 between the entry of this order and December 31, 1990, or 4,650 between January 1 and September 1, 1991.

9. The County defendants may utilize expanded use of release on recognizance and their pre-trial services agency, extensive use of electronic monitoring and drug testing programs for pre-trial detainees, or the implementation of alternative community corrections programs pursuant to the provisions of House Bill 2335 to remove county prisoners from Harris County detention facilities and ameliorate overcrowded conditions.

10. Whenever the population of Harris County detention facilities, exclusive of prisoners ready for transfer to TDCJ-ID, exceeds 4,750 between the entry of this order and December 31, 1990 or 4,650 between January 1 and September 1, 1991 for 15 consecutive days, the Alberti Special Master shall make sufficient releases to meet the then-applicable cap. In making releases, the Special Master shall operate, first, to reduce any potentialy adverse impact of such releases on public safety and, second, to maximize the impact of releases on actual population reductions. Releases shall be made in order of those least likely to create danger to the community in the opinion of the Special Master, and choices among the categories of those released will be based on the impact of projected releases on the actual population. Among the categories of County prisoners the Special Master shall consider for release are misdemeanant pre-

trial detainees who are not charged with a felony; pre-trial detainees charged with a third degree felony who have scored six or seven points on their pre-trial services interview and are not charged with another felony; Class C misdemeanants held in lieu of the payment of court costs/fines; Class A and B misdemeanants serving court costs/fines; and parole violators arrested on a so-called "Blue Warrant" for the technical violation of parole conditions rather than a new criminal charge. In addition, if necessary to meet the cap, the Special Master may award sufficient increments of daily good time to convicted Class A and B misdemeanants to accomplish the needed releases. The County defendants shall cooperate fully with the Special Master in the conduct of all such releases and provide whatever logistical support he may need to carry out his duties pursuant to this provision. The County defendants shall not be in contempt of this order if, despite compliance with all aspects of this order, through the releases and acceleration of good time directed in this paragraph, the caps required by this order are not achieved.

11. The State and County defendants shall cooperate to implement as quickly as possible a plan, pursuant to the provisions of House Bill 2335, designed to reduce the population of the Harris County detention facilities in order to minimize the need for awards of good time and early releases of prisoners. To this end, all provisions of paragraph 6 of the court's order of April 5, 1990 shall continue in full force and effect.

12. Based on information to be provided by the Alberti Special Master, the court will review on a quarterly basis the actions taken pursuant to this order and the impact of those actions on the level of population in the Harris County detention facilities to determine whether this order is having its intended effect and whether any modification is required.

13. The court specifically retains jurisdiction over this matter.

Done in Houston, Texas this 6th day of September, 1990.

/s/
James DeAnda
Chief Judge
United States District Court
Southern District of Texas

/s/
William Wayne Justice
United States District Judge
United States District Court
Eastern District of Texas
Sitting by Designation

APPENDIX W

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
THE SHERIFF OF HARRIS COUNTY, et al.,	§	
	§	
Defendants/Third-Party Plaintiffs,	§	C. A. No. 72-H-1094
	§	
v.	§	
	§	
WILLIAM P. CLEMENTS, et al.,	§	
	§	
Third-Party Defendants.	§	

ORDER

On September 25, 1989, the court entered Findings of Fact and Conclusions of Law relating to the unconstitutionality of conditions in Harris County detention facilities and the liability of the State and Count defendants for such conditions. After lengthy negotiations among the parties over proposed remedies for dealing with overcrowding and unconstitutional conditions, the subsequent submission by the parties of remedial plans and a lengthy hearing on the propose remedial plans conducted before the undersigned judges, a remedial order was

entered on March 15, 1990. Since that date, the parties have filed motions that have brought to our attention the need to clarify certain provisions in that order and, in one minor respect, to modify the prior order. It should be emphasized that these clarifications and the minor modification in no manner depart from the intent of the court when it entered its March 15 order. In order to avoid misunderstanding, the order of March 15, 1990 will be vacated and this order will be entered in its place, nunc pro tunc. Accordingly, the following remedial measures are hereby ordered and directed:

1. Upon the entry of this order, the overall population of Harris County detention facilities shall not exceed 6,700 prisoners.

2. The overall population of Harris County detention facilities shall be reduced to 6,400 prisoners by May 15, 1990, and shall be reduced to 6,100 prisoners by August 31, 1990. These objectives shall be achieved by actions of the State defendants and the County defendants, as set forth below.

3. Between February 1, 1990 and August 31, 1990, the State defendants shall cause at least 9,130 prisoners ready for transfer from Harris County detention facilities to the Institutional Division of the Texas Department of Criminal Justice (formerly the Texas Department of Corrections, and referred to hereafter as "the Institutional Division"), as defined below, to be removed from the Harris County detention facilities.

4. For the purpose of this order, a prisoner ready for transfer to the Institutional Division is an individual who has been convicted of a felony and sentenced, and whose immediate transfer to the Institutional Division would be in compliance with section 8 of article 42.09 of the Texas Code of Criminal Procedure.

5. The County defendants shall compile and submit to the State defendants every ten days a list of prisoners potenti-

ally eligible for parole in absentia (PIA) or pre-parole transfer (PPT), together with the necessary paperwork on each identified prisoner. The County defendants shall be responsible for forwarding the necessary paperwork on eligible prisoners within ten days of their receipt of the requisite paperwork from the courts or prosecutors.

The State defendants shall take final action on parole within 45 days of receiving notification from all personnel that a prisoner is eligible, together with the receipt of all necessary paperwork. The period of time consumed by the "Notice to Trial Officials" procedures shall not be included in this 45-day time limit. The State defendants shall be required to take final action on prisoners eligible for PPT within 45 days, subject to the availability of PPT beds.

6. The County defendants have submitted a plan, pursuant to the provisions of House Bill 2335, portions of which propose alternative facilities and programs for convicted felons traditionally transferred to the Institutional Division who are, or will be, kept in Harris County. The County defendants' plan shall be reviewed expeditiously by appropriate State officials. If approved, the State defendants shall immediately take all steps that are necessary and within their authority to provide funding to the County for the implementation of the plan, through a request for budget executions or other means. The State defendants will not be obligated, however, to provide funding for such purpose in excess of the monetary limits established pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4, and in determining whether any advance of funds is required pursuant to a budget execution, the State defendants may take into account the ability of the County defendants to fulfill their obligations under the plan during the period for which any accelerated funding may be requested.

7. During the period covered by this order, the State defendants shall maintain the current allocation formula for admissions to the Institutional Division as adopted by the Board of Criminal Justice on January 29, 1990 pursuant to Tex. Rev.

Civ. Stat. Ann. art. 6166a-4. That proportional share of admissions to the Institutional Division shall remain constant with respect to both current Institutional Division facilities and such Institutional Division facilities as may come on line and be ready for occupancy by prisoners during the period covered by this order.

8. On May 31, 1990, the Sheriff of Harris County shall notify the court of the number of prisoners ready for transfer to the Institutional Division who were removed by the State defendants from the Harris County detention facilities between February 1 and May 31, 1990. On August 31, 1990, the Sheriff of Harris County shall notify the court of the number of prisoners ready for transfer to the Institutional Division who were removed by the State defendants from the Harris County detention facilities between June 1 and August 31. If the State defendants have not removed 4,565 prisoners from the Harris County detention facilities between February 1 and May 31, 1990, or a total of 9,130 prisoners from the Harris County detention facilities by August 31, 1990, awards of administrative good time pursuant to this order shall be made to prisoners in Harris County detention facilities ready for transfer to the Institutional Division who have been identified already as eligible for consideration for either PIA or PPT, and whose names and paperwork have been submitted by the County defendants, other than the following: (1) prisoners who are serving a sentence for an offense for which the judgment contains an affirmative finding under Subdivision (2) of Subsection (a) of section 3g, article 42.12, Texas Code of Criminal Procedure; (2) prisoners who are serving a sentence for an offense listed in one of the following sections of the Texas Penal Code: (A) section 19.02 (murder); (B) section 19.03 (capital murder); (C) section 19.04 (voluntary manslaughter); (D) section 20.03 (kidnapping); (E) section 20.04 (aggravated kidnapping); (F) section 21.11 (indecency with a child); (G) section 22.01 (sexual assault); (H) section 22.021 (aggravated sexual assault); (I) section 22.03 (deadly assault on law enforcement or corrections officer or court participant); (J) section 22.04 (injury to child or an elderly

individual); (K) section 25.02 (incest); (L) section 25.06 (sale or purchase of a child); (M) section 25.06 (solicitation of a child); (N) section 28.02 (arson); (O) section 29.02 (robbery); (P) section 29.03 (aggravated robbery); (Q) section 30.02 (burglary), if the offense is punished as a first degree felony under that section; (R) section 43.04 (aggravated promotion of prostitution); (S) section 40.05 (compelling prostitution); (T) section 40.24 (sale, distribution, or display of harmful material to minor); (U) section 43.25 (sexual performance by a child); (V) section 46.11 (deadly weapon in penal institution); (W) section 15.01 (criminal attempt), if the offense attempted is listed in this paragraph; (X) section 15.02 (criminal conspiracy), if the offense that is the subject of this conspiracy is listed in this paragraph; or (Y) section 15.30 (criminal solicitation), if the offense solicited is listed in this paragraph; and (3) prisoners who are serving a sentence for an offense listed in section 4.03(c) or 4.032(c) (aggravated manufacture or delivery of a controlled substance), section 4.04(c), 4.041(c), 4.042(c), or 4.043 (c) (aggravated possession of a controlled substance), section 4.05 (delivery of marijuana) if the offense is punished under Subsection (b)(5) of that section, section 4.05(c) (aggravated delivery of marijuana), or section 4.051(c) (aggravated possession of marijuana) of the Texas Controlled Substance Act (article 4476-15, Vernon's Texas Civil Statutes).

In the event that awards of extra administrative good time are required to achieve the removals required of the State defendants, 30 days of administrative good time shall be made to eligible prisoners. If the initial award of 30 days of administrative good time does not suffice to produce the required number of removals, 30-day increments of administrative good conduct time shall continue to be awarded to all eligible prisoners until the number of required removals has been accomplished. The State defendants shall not be in contempt of this order if, despite compliance with all aspects of this order, the acceleration of administrative good time as directed in this paragraph fails to produce a sufficient number of prisoners eligible for release through PIA or PPT to accomplish the number of required

removals. The Special Master in this case shall apprise the court if any awards of administrative good time are required by this paragraph, in which event such awards shall be ordered by the Alberti court upon recommendation of the Special Master. The State and County defendants shall cooperate to develop an orderly process for the identification of prisoners eligible for additional good time and provide that information to the Special Master.

9. Not later than ten days following the entry of this order, the Sheriff of Harris County shall file a report with the court setting forth the total number of inmates in Harris County detention facilities, who are not ready for transfer to the Institutional Division, as of the date of entry of this order. This number shall include pre-trial detainees, county prisoners, Class C misdemeanants, parole violators, bench-warrant prisoners, fugitives, civil district court detainees, federal prisoners, immigration prisoners, inmates convicted and sentenced to less than ten years whose cases are on appeal under authority of Tex. Code Crim. Pro Ann. art. Ë42.09, Ë4 and convicted and sentenced inmates with multiple indictments whose trials are not completed.

10. Commencing on the date of this order, the County defendants shall ensure that the population of inmates in Harris County detention facilities, who are not ready for transfer to the institutional Division, is maintained at a level that will permit the achievement of the objectives of paragraph 2 of this order. The County defendants may meet this obligation through a variety of self-initiated means, including, for example, an expedited, critical review of their present pre-trial detainee population, in conjunction with the County and State judiciary, to remove detainees determined to be eligible for release on personal bond; the introduction and use of the electronic monitoring and drug testing programs for pre-trial detainees; implementation of community corrections programs pursuant to the provisions of House Bill 2335; or any other feasible and appropriate measures.

11. On May 31 and August 31, 1990, the Sheriff of Harris County shall notify the court of the total number of inmates in Harris County detention facilities. If, despite the adoption of the voluntary measures described in paragraph 10, above, the total number of inmates exceeds 6,400 on May 15 despite the State defendants' compliance with paragraphs 3, 5, and 8 of this order, or the total number of inmates exceeds 6,100 on August 31 despite the State defendants' compliance with paragraphs 3, 5, and 8 of this order, the Alberti Fact-Finding Master shall release misdemeanor pre-trial detainees, first releasing those charged with the lowest category of offense, provided that no misdemeanor detainee shall be released who is also charged with a felony. If the mandated population reduction requires the release of one or more pre-trial detainees charged with a particular category of offense, all of the eligible members in that category shall be released. If the release of misdemeanor pre-trial detainees does not suffice to produce the required reduction, the Fact-Finding Special Master shall next release pre-trial detainees charged with a third degree felony who score a six or seven on their pre-trial services interview, and who are not also charged with another felony offense. If the release of misdemeanor and third degree felony pre-trial detainees does not suffice to produce the required reduction in population, the Fact-Finding Special Master shall release Class C misdemeanants held in lieu of the payment of court costs/ fines. Releases within this category shall be based on the amount of the costs/fines to be served, with those having the least costs/fines to serve being released first. If meeting the mandated reduction requires the release of one or more offenders in a particular category, all of the eligible members in that category shall be released. Thus if two releases are required to meet the quota, but there are six incarcerated misdemeanants serving only one day in lie of costs/fines, all six are to be released. If the release of Class C misdemeanants serving costs/fines does not suffice to produce the required reduction, the Fact-Finding Special Master shall release Class A and B misdemeanants serving court costs/fines. Releases in this category, again, shall be based on the amount of the costs or fines to be served, with those having the least costs

or fines being released first. If the release of Class C misdemeanants serving fines and Class A and B misdemeanants serving costs/fines does not suffice to produce the required reduction, the Fact-Finding Special Master shall award sufficient increments of daily administrative good time to Class A and B misdemeanants serving County time to accomplish the number of releases required. If more than the number of inmates needed to meet the required reduction are eligible for release based on the award of a specific amount of good time, all inmates made eligible by the award of good time shall be released. The Fact-Finding Special Master shall continue to award daily increments of administrative good time to prisoners serving County time and make releases in the order prescribed above until the number of inmates in Harris County detention facilities reaches the levels required by paragraph 2 of this order to be accomplished by May 15 and August 31. In directing the foregoing releases, the Fact-Finding Special Master shall operate with a view to reducing the potentially adverse impact of such releases on public safety; releases shall be made in order of those least likely to create a danger to the community in the opinion of the Special Master. The County defendants shall not be liable for proceedings in contempt of this order if, despite compliance with all aspects of this order, through the acceleration of good time and releases directed in this paragraph, an insufficient number of prisoners is identified and released to meet the reductions mandated by this order.

12. The court specifically retains jurisdiction over this matter.

IT IS HEREBY ORDERED that the court's order of March 15, 1990, be and hereby is vacated.

DONE in Houston, Texas this 5th day of April 1990, nunc pro tunc March 15, 1990.

/s/
James DeAnda

Chief Judge
United States District Court
Southern District of Texas

/s/
William Wayne Justice
United States District Judge
Eastern District of Texas
Sitting by Designation

APPENDIX X

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL.	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS; ET AL.	§	
	§	
	§	
VS.	§	
	§	
WILLIAM P. CLEMENTS; ET AL.	§	
	§	

ORDER

The Court ORDERS that County Defendants' motion to amend or supplement the findings and conclusions entered September 25, 1989, or, in the alternative for a new trial is DENIED.

SIGNED in Houston, Texas, this 23rd day of October, 1989.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX Y

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL.	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
JOHNNY KLEVENHAGEN, ET AL.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case presents a triad of pending matters aimed at vindicating the rights of inmates presently incarcerated in the Harris County Jail facilities. First, Plaintiffs have filed series of motions[1] requesting supplemental relief against the Sheriff of Harris County and the Harris County Commissioners Court (County Defendants). Second, County Defendants have filed a third-party action against various state officials (State Defendants)[2] alleging that the state officials are liable to them

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[1] Plaintiffs' pending motions are: (1) Plaintiffs' motion to modify the Courts' November 8, 1988 Order, or, in the alternative, for an additional interim order (filed January 11, 1989); (2) Plaintiffs' motion for supplemental relief establishing population limits on the Harris County detention facilities (filed February 17, 1989); (3) Plaintiffs' motion for additional supplemental relief establishing population limits on the Harris County detention facilities (filed May 30, 1989); (4) Plaintiffs' motion for additional supplemental relief requesting additional jail staff assistants for the monitors, and good time credits (filed May 30, 1989); and (5) Plaintiffs' motion for a temporary restraining order and preliminary injunction (filed September 11, 1989).

[2] State Defendants are the following state officials who control the admissions policy and population levels of the Texas Department of Corrections (TDC): William P. Clements, Governor of the State of Texas;

for all or part of Plaintiffs' claims against the county relating to conditions of confinement in the Harris County Jail. In particular, County Defendants claim that the State Defendants' refusal to accept all convicted felons ready for transfer into the Texas Department of Corrections (TDC) is the primary cause of unconstitutional conditions of confinement in the Harris County Jail. Third, in response to the Court's suggestion, Plaintiffs have filed a motion for leave to file a supplemental complaint against the State Defendants already joined as third-party defendants by County Defendants.[3]

Trial to the bench on County Defendants' third-party complaint commenced on August 14, 1989 and concluded on August 18, 1989. At the conclusion of evidence, the Court took the matter under advisement and requested post-trial briefs on certain issues. The Court subsequently held a hearing on Plaintiffs' request for supplemental relief from September 12, 1989 through September 15, 1989. Now, after reviewing the record, the testimony and credibility of the witnesses, and the applicable law, the Court concludes, as is more fully set forth in the findings of fact and conclusions of law below, that State Defendants and County Defendants are liable for the unconstitutional conditions of confinement presently existing in the Harris County Jail facilities.

James Lynaugh, Director of TDC; Charles T. Terrell, Chairman of the Texas Board of Corrections; and Deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James M. Eller, F. L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann, and Jerry H. Hodges, Board Members on the Texas Board of Corrections.

[3] Actually, Plaintiffs seek to join several additional state officials who were not previously joined as third-party defendants by County Defendants. The additional state officials include the board members of the Texas Board of Pardons and Paroles as well as two board members of the new Texas Board of Criminal Justice who were not included in County Defendants' list of the members of the previous Texas Board of Corrections. Moreover, Plaintiffs have attempted to name the State of Texas as a defendant. The list of state officials Plaintiffs seek to join presents problems that the Court will more fully address below.

PROCEDURAL HISTORY

On August 14, 1972, Lawrence R. Alberti and others filed a class action against County Defendants pursuant to 42 U.S.C. § 1983 claiming that conditions of confinement in the Harris County Jail facilities violated their statutory and constitutional rights. Two and a half years later, in February of 1975, the parties agreed to, and this Court entered, a consent judgment. The consent judgment required County Defendants, inter alia, to provide sufficient funds to increase jail capacity, to provide sufficient guards to assure safety without relying on inmate assistants, and to provide adequate medical, dental, and rehabilitative services to the inmates. The Court retained exclusive jurisdiction to issue interim orders necessary for relief in the action.

Not long after the February, 1975 consent decree was entered, Plaintiffs filed a motion for supplemental relief alleging: that County Defendants had failed to implement a viable pre-trial release program, and that the amount of financing committed to the construction of new facilities was wholly inadequate. After conducting a six-day evidentiary hearing on Plaintiffs' motion and touring the jail facilities, the Court issued a lengthy and detailed supplemental remedial order. See Alberti v. Sheriff of Harris County, 406 F.Supp. 649 (S.D. Tex. 1975).

Ultimately, the Court approved County Defendants' plans for the construction of a new central jail and a staffing plan that required County Defendants to provide at least one guard per forty-five inmates at the new facility. In August of 1983, Plaintiffs filed a motion for contempt, alleging that County Defendants had never succeeded in complying with the staffing order. After conducting a lengthy evidentiary hearing, the Court found the conditions existing within the jail to be unconstitutional and entered yet another supplemental remedial order regarding minimum staffing levels at the jail facilities. See Alberti v. Sheriff of Harris County, 600 F.Supp. 443 (S.D. Tex. 1984), aff'd 790 F.2d 1220 (5th Cir. 1986).

After the Court appointed special masters in 1987 to monitor County Defendants' compliance with the Court's remedial orders, it appeared that a spirit of cooperation between Plaintiffs and County Defendants would eventually lead to full compliance with all Court orders with a minimum of direct judicial intervention. However, during 1988, TDC's refusal to accept all convicted felons ready for transfer from the jail prevented County Defendants from fully complying with this Court's orders.

By early November of 1988, the overcrowded conditions in the jail facilities had reached crisis proportions. After considerable negotiations among Plaintiffs, the Special Master, and County Defendants, the parties presented a proposed order to the Court at a November 4, 1988 hearing[4] that would require the Sheriff to transport to TDC each week at least 250 male and 40 female convicted felons who were ready for transfer. Three days later, Plaintiffs filed an unopposed motion for interim emergency relief that requested the entry of the proposed order discussed at the November 4 hearing. On November 8, 1988, the Court signed the requested order.[5]

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[4] The November 4 hearing had been previously set to consider the more mundane problem of establishing a budget for the Special Master. The Court received notice that the parties wanted to discuss the entry of the proposed order only one day prior to the hearing.

[5] In its August 11, 1989 opinion on State Defendants' petition for a writ of mandamus, the Court of Appeals incorrectly, yet understandably, concluded that this Court entered the November 8, 1988 Order sua sponte. See, In re: William P. Clements, No. 89-2706, Slip Opinion at p. 5 (5th Cir. 1989). In fact, the unopposed motion for interim emergency relief (instrument number 896 in file). Although Plaintiffs' motion was received by the Clerk's Office on November 7, 1988 (as indicated by a stamp on the

(footnote continued on next page)

(footnote continued from previous page)

reverse side of the last page of the proposed order that was attached as an exhibit to the motion), through clerical error, the motion was not "filed" until December 7, 1988.

Despite the Court's November 8, 1988 order, TDC refused to accept any convicted felons beyond the 182 felons it agreed to accept each week according to its "scheduled admissions policy." Without TDC's cooperation, the Sheriff was unable to comply with the Court's November 8, 1988 order. Therefore, on December 12, 1988, County Defendants filed a motion to stay the November 8, 1988 order and a motion asking the Court to require Plaintiffs to join the appropriate TDC officials as defendants pursuant to Fed. R. Civ. P. 19(a) and 21. Plaintiffs opposed County Defendants' motion to stay, and, although Plaintiffs agreed that TDC officials should be joined as parties, they had no desire to amend their complaint to add TDC officials as defendants.[6] Instead, Plaintiffs sought to have the noncooperating TDC officials held in contempt for interfering with the Sheriff's ability to comply with the November 8, 1988 order.

After conducting a conference on January 12, 1989, the Court granted the Sheriff's motion to stay the November 8, 1988 order, denied Plaintiffs' suggestion of contempt, [7] and denied County Defendants' motion to require Plaintiffs to join TDC officials as defendants. However, the Court granted County Defendants leave to join the appropriate state officials as third-party defendants pursuant to Fed. R. Civ. P. 14(a).

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[6] Plaintiffs argued that if TDC officials were to be joined, County Defendants should join them as third-party defendants pursuant to Fed. R. Civ. P. 14(a).

[7] Contempt proceedings would have been an ill-suited method of determining whether TDC had any duty to accept felons pursuant to the Court's November 8, 1988 order. Moreover, the Court was concerned that contempt proceedings would have been premature because at that time there had not yet been a finding that the then existing conditions of confinement in the Harris County Jail facilities were unconstitutional. See, Benjamin v. Malcolm, 803 F.2d 46, n.6 (2d Cir. 1986), cert. denied sub. nom. Cuomo v. Koehler, 480 U.S. 910 (1987). (distinguishing Badgley v. Veralas, 729 F.2d 894 (2d Cir. 1984)).

County Defendants filed their third-party complaint against State Defendants on January 20, 1989. State Defendants responded with a series of motions to dismiss, to transfer venue, to join additional parties, to stay proceedings, and to abstain from exercising jurisdiction. On May 12, 1989, after receiving extensive briefs, the Court denied all of State Defendants' motions.

On June 9, 1989, the Court entered an order that recognized the unusual procedural posture of this case and sought to establish an expeditious, yet procedurally fair, manner of resolving the issues raised in County Defendants' third-party complaint. Because the facts relevant to a determination of the appropriate relief County Defendants were entitled to by their third-party complaint appeared to be fully developed by the Special Master's June 2, 1989 Final Findings, the Court sua sponte moved for summary judgment in favor of County Defendants.[8] The Court indicated that if either party filed timely sworn objections to any of the Special Master's findings, the Court would proceed by holding a plenary evidentiary trial to the bench on August 14, 1989. Because both parties subsequently filed objections to the Special Master's June 2, 1989 findings, the Court's sua sponte motion for summary judgment became moot.

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[8] State Defendants objected to the Court's sua sponte motion for summary judgment, claiming that it not only violated Fed. R. Civ. P. 56, but that it was "fundamentally unfair under traditional notions of due process." See State Defendant's cross motion for summary judgment and response to Court's order of June 9, 1989 (instrument number 992 in file) at 3, n. 2. However, both the United States Supreme Court and the Fifth Circuit Court of Appeals have recognized that a district court may sua sponte grant summary judgment when the parties have been given adequate time for discovery and adequate notice that they must come forward with all their evidence. See Celotex Corporation v. Catreett, 477 U.S. 317, 326 (1986); Page v. DeLaune, 837 F.2d 233, 238 (5th Cir. 1988). This case appeared to be well suited for disposition on summary judgment because the factual accuracy of the Special Master's findings could hardly be doubted. At the subsequent trial on County Defendants' third-party complaint, State Defendants offered no meaningful challenge to the accuracy of the Special Master's findings.

On May 30, 1989, Plaintiffs filed a motion asking the Court to transfer consideration of their requests for supplemental relief to the Honorable William Wayne Justice, the presiding judge in Ruiz v. Estelle, C.A. No. H-78-987 (S.D. Tex.). State Defendants responded to Plaintiffs' motion by urging a transfer of proceedings on County Defendants' third-party complaint; however, State Defendants objected to the transfer of Plaintiffs' pending motions. On June 29, 1989, State Defendants also filed a motion asking the Court to reconsider its May 12, 1989 Memorandum and Order denying their various motions to dismiss in light of the recent passage and acceptance of H.B. 2335.[9] By an order entered July 11, 1989, the Court denied Plaintiffs' motion to transfer proceedings and State Defendants' motion to reconsider.[10] Shortly thereafter, State Defendants filed an application for a writ of mandamus with the Fifth Circuit Court of Appeals asking the Court of Appeals to order this Court to transfer consideration of County Defendants' third-party complaint to the Ruiz court.

On August 11, 1989, the Friday preceding the trial scheduled for Monday, August 14, 1989, the Fifth Circuit Court of Appeals entered an order granting in part and denying in part State Defendants' petition for a writ of mandamus.[11] In essence the Court of Appeals allowed this Court to proceed with the August 14, 1989 trial to determine the merits of County Defendants' claims against State Defendants. However, in the event this Court found State Defendants liable to County Defendants, it was directed to transfer proceedings on the third-party complaint to Judge Justice for a determination of

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[9] Acts 1989, 71st Leg., Ch. 785.

[10] In response to Plaintiffs' request for clarification, the Court also gave notice to the parties in its July 11, 1989 order that it would permit Plaintiffs to present evidence relevant to their pending motions for relief against County Defendants at the August 14, 1989 trial. Allowing Plaintiffs to participate in the August 14, 1989 trial quickly created problems the Court did not anticipate in its July 11, 1989 order. Thus, 24 days later, on August 4, 1989, the Court informed the parties that it would not hear evidence on Plaintiffs' pending motions at the August 14, 1989 trial.

[11] In re: William P. Clements, et al., No. 89-2706 (5th Cir. 1989).

appropriate relief as to the State Defendants. Accordingly, the Court conducted the trial on County Defendants' third-party complaint in compliance with the Court of Appeals' directive. Thereafter, the Court concluded that it would be helpful to hear evidence on Plaintiffs' pending requests for relief. Thus, beginning September 12, 1989, the Court conducted a four-day hearing on Plaintiffs' pending motions. The Court allowed State Defendants to participate fully at the September 12 hearing and announced that it intended to consider all matters on a consolidated basis.

ALIGNMENT OF THE PARTIES

After taking County Defendants' third-party complaint under advisement, the Court became concerned that the original joinder of State Defendants may have been technically defective. as indicated above, the Court originally denied County Defendants' motion seeking to force Plaintiffs to join State Defendants pursuant to Fed. R. Civ. P. 19(a) and 21. Instead, Plaintiffs persuaded the Court that it would be more appropriate to join State Defendants as third-party defendants pursuant to Fed. R. Civ. P. 14(a). Moreover, under virtually identical circumstances, the Sixth and Second Circuit Courts of Appeals have held that joinder of State Defendants as third-party defendants is appropriate.[12] See Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986), cert. denied sub. nom. Cuomo v. Koehler, 480 U.S. 910 (1987); Tate v. Frey, 735 F.2d 986 (6th Cir. 1984).

Nevertheless, County Defendants' joinder of State Defendants as third-party defendants pursuant to Rule

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[12] Tate v. Frey explicitly relied on Rule 14(a) as justifying the joinder of state officials by county officials. See Tate, 735 F.2d at 988-89. In Benjamin v. Malcolm, the Court of Appeals affirmed the district court's joinder of state officials as third-party defendants. However, the city defendants in Benjamin relied on Rules 19, 20 and 21 to justify joining state officials as third-party defendants. See Benjamin, 803 F.2d at 50; see also Benjamin v. Malcolm, 629 F.Supp. 713 (S.D. N.Y. 1986).

14(a) may have presented a serious jurisdictional problem under Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984). The Court expresses this concern at the hearing on Plaintiffs' requests for supplemental relief. In response to the Court's suggestion that an amended complaint would be appropriate, Plaintiffs filed a motion for leave to file a supplemental complaint naming various state officials as defendants pursuant to Fed. R. Civ. P. 15(d) and 19(a). The Court will grant Plaintiffs' motion for leave to file a supplemental complaint because the Court concludes that Plaintiffs' joinder of State Defendants pursuant to Rule 19(a) provides a more secure jurisdictional basis for relief than County Defendants' third-party complaint pursuant to Rule 14(a).

In its may 12, 1989 Memorandum and Order, the Court recognized that it had no jurisdiction to order State Defendants to obey state law.[13] However, the Court noted that this well recognized principle does not bar it from ordering State Defendants to conform their conduct to federal constitutional standards.[14] By way of explanation, the Court wrote:

> In the present case, [State Defendants] have two distinct duties: First, [State Defendants] have a state-imposed duty to "speedily" accept convicted felons into TDC. Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970). Second, [State Defendants] have a federal constitutional duty to not impose cruel and unusual punishment upon persons convicted of a felony in this state. If [State Defendants] have merely failed to "speedily" accept convicted felons into TDC as required by Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970), this Court is powerless to compel compliance.

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[13] May 12, 1989 Memorandum and Order at 8.
[14] May 12, 1989 Memorandum and Order at 8.

> However, if [State Defendants] are directly responsible for the cruel and unusual punishment of convicted felons, this Court certainly has the authority to compel compliance with constitutional standards [footnotes and citations omitted].

May 12, 1989 Memorandum and Order at 8-9.

The Court believes that the passage quoted above accurately describes the "distinct duties" owned by State Defendants.[15] However, the cited passage failed to recognize explicitly that the "first distinct duty" owed by State Defendants is owed to County Defendants, whereas the "second distinct duty" owed by State Defendants is owed to the inmates at the Harris County Jail facilities, or the Plaintiff Class. The "second distinct duty," the duty to not impose cruel and unusual punishment, is the only federal duty this Court has the power to enforce.

The problem created by State Defendants' joinder as third-party defendants pursuant to Rule 14(a) becomes apparent once one recognizes that State Defendants' duty to not impose cruel and unusual punishment is owed to Plaintiffs, not to County Defendants. Rule 14(a) provides in relevant part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. . . .

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[15] Of course, State Defendants' state-law duty to "speedily" accept inmates was modified by H.B. 2335. Nevertheless, State Defendants' duties toward the County Defendants appear to remain grounded in state law.

Prior to 1948, Rule 14(a) permitted a defending party to join as a third-party defendant any person not a party to the action "who is or may be liable to the third-party plaintiff or to the plaintiff." (Emphasis added). However, because the courts had held that a plaintiff could not be compelled to amend his complaint to state a claim against an additional party if he did not wish to do so, [16] the phrase "or to the plaintiff" was deleted from Rule 14(a) in 1948.[17] Thus, Rule 14(a), as amended, only allows a defendant to implead a third-party defendant if applicable law renders the third-party defendant liable to the defendant for some or all of the plaintiff's claims against the defendant. See Wright & Miller, Federal Practice and Procedure: Civil, Ë 1446 at 258 (West 1971). in this case, joinder of State Defendants pursuant to Rule 14(a) may have been improper because the only duties State Defendants owe County Defendants appear to be created by state law - duties this Court cannot enforce under Pennhurst. The federal duty State Defendants have breached is owed to Plaintiffs, not County Defendants.

In both Tate v. Frey and Benjamin v. Malcolm the state officials faced claims that they had a state-law duty to accept convicted felons from the local jails. In both cases, the Courts of Appeals rejected the state officials' contentions that Pennhurst barred relief against them because the courts noted that the district courts' orders were based upon findings that the state officials contributed to the violation of the inmates' federal constitutional rights. See Tate, 735 F.2d at 990; Benjamin, 803 F.2d at 52. Neither Court of Appeals appeared to be concerned, as this Court is, that local officials sought and were granted relief against state officials based on the state officials' violations of the inmates' rights, not the rights of the local officials.

The Benjamin Court cited the All Writs Act, 28 U.S.C. § 1651(a),[18] as providing federal jurisdiction over the

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[16] Of course, the rule that a plaintiff cannot be compelled to state a claim against an additional party if he does not wish to do so does not apply if the conditions of Fed. R. Civ. P. 19 are met.

[17] See, Advisory Committee's Note to the 1948 amendment to Rule 14 reprinted at 5 F.R.D. 446-48.

[18] 28 U.S.C. Ë 1651(a) provides:

city officials' claims against the state officials. Benjamin, 803 F.2d at 53. Relying on United States v. New York Telephone Co., 434 U.S. 159, 174 (1977), the Benjamin court noted that the Supreme Court had held that the All Writs Act authorizes a federal court in exceptional circumstances to issue orders to persons, "who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." Benjamin, 803 F.2d at 53 (citing New York Telephone, 434 U.S. at 174).

The Fifth Circuit Court of Appeals may ultimately follow Tate and Benjamin and conclude that federal jurisdiction exists over County Defendants' third-party complaint against State Defendants. For this reason, the Court will not disturb the present alignment between County and State Defendants. Nevertheless, the Court concludes that it would be remiss if it did not allow the filing of Plaintiffs' supplemental complaint as an alternative basis for jurisdiction.

The Court finds ample authorization in the Federal Rules of Civil Procedure and applicable case law that justifies such a post-trial amendment of pleadings. Fed. R. Civ. P. 21 provides, "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Federal courts have always recognized their duty to look beyond the pleadings on file to arrange the parties according to their true interests. See City of Indianapolis v. Chase National Bank of City of New York, 314 U.S. 63 (1941). Although such vigilance is normally required to avoid circumvention of the "complete diversity" rule of Strawbridge v. Curtiss, 3 Cranch 267 (1806), realignment

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The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

may be necessary on other grounds as well.[19] In this case, Plaintiffs should be aligned as adversaries of State Defendants in order to avoid any questions of standing or jurisdiction.

State Defendants are clearly persons who should be joined if feasible under Rule 19(a)(1) because their joinder by Plaintiffs will not deprive the Court of jurisdiction and complete relief cannot be accorded among those already parties in their absence. The Fifth Circuit Court of Appeals has held that once a court has determined that a party should be joined under Rule 19(a), it should order the plaintiff to amend his complaint to add the party. English v. Seaboard Coast Line Railroad Co., 465 F.2d 43, 47 (5th Cir. 1972).

The United States Supreme Court has recognized that plaintiffs may have to resort to supplemental pleadings naming additional defendants where parties who were not originally joined as defendants have frustrated the Court's ability to vindicate plaintiffs' rights. See Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 226-27 (1964). The best practice would require parties to file supplemental pleadings raising all issues in advance of the trial. However, in this case the Court concludes that Rule 15(b) authorizes Plaintiffs' post-trial amendment so that the pleadings will conform to the evidence

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[19] For example, in Forsberg v. Pacific Northwest Bell Telephone Co., 622 F.Supp. 1147 (D.Or. 1985), aff'd 840 F.2d 1409 (9th Cir. 1988), the district court joined a union and union locals pursuant to Rule 19(a), then realigned the parties to ensure that any relief granted the plaintiff would be binding on the union and to protect the defendant employer from inconsistent liability. In Pennell v. Collector of Revenue, 703 F.Supp. 823 (W.D. Mo. 1989), the district court had to consider the proper alignment of the parties to determine whether all properly aligned defendants had joined in the removal petition as required. This Court itself recently had to consider the proper alignment of the parties in order to determine the necessity of a bond in a case where a preliminary injunction was entered and the United States was the nominal plaintiff. United States v. Taylor, et al., C.A. No. H-89-672. (S.D. Tex. March 21, 1989) (Memorandum and Order granting a preliminary injunction), aff'd, Nos. 89-2328, 89-2373 (5th Cir. August 28, 1989) (slip opinion).

presented at the August 14, 1989 trial and at the September 12, 1989 hearing.

The State Defendants previously joined as third-party defendants will not be prejudiced by Plaintiffs' post-trial supplemental complaint because the pretrial pleadings on County Defendants' third-party complaint, the Court's Orders entered May 12, 1989 and July 11, 1989, and the course of the August 14, 1989 trial and September 12, 1989 hearing gave State Defendants actual notice that a key issue was whether State Defendants' conduct resulted in the cruel and unusual punishment of the inmates in the Harris County Jail. Where the parties are actually aware of the issues to be tried, the court does not impinge on the defendant's right to due process by allowing a post-trial amendment. See Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 840-41 (D.C. Cir. 1950); Wright & Miller, Federal Practice and Procedure: Civil, Ë 1491 (West 1971).

However, the Court concludes that it would be improper to allow Plaintiff to join, post-trial, additional state officials who did not fully participate in the proceedings already conducted as third-party defendants. Thus, the Court will allow Plaintiffs to file their supplemental complaint, but it will deny Plaintiffs' request to join additional parties and strike any allegations in the supplemental complaint insofar as they apply to new parties.[20]

FINDINGS OF FACT

1. Plaintiffs' claims against County Defendants and State Defendants arose in this district. County Defendants' claims against State Defendants also arose in this district.

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[20] Plaintiffs' request to join the State of Texas would have been futile even if made prior to trial. This Court has no jurisdiction to entertain legal or equitable relief against the State of Texas as an entity. Cory v. White, 457 U.S. 85 (1982); Edelman v. Jordan, 415 U.S. 651 (1974).

2. The Harris County Jail facilities presently consist of the central jail, located at 1301 Franklin Street, and the detention center, located in Humble, Texas. County Defendants expect to complete renovation of the old "301 San Jacinto" jail by October of 1989 and to complete construction of a new "701 San Jacinto" jail by late 1991 or early 1992.

3. The design capacity according to the Texas Commission on Jail Standards for the 1301 Franklin central jail is 3,505 inmates. The design capacity of the Detention Center is 776 inmates. Thus, the total design capacity for the present Harris County Jail facilities is 4,281 inmates.

4. When completed, the design capacity of the old "301 San Jacinto" jail will be approximately 400, and the design capacity for the new "701 San Jacinto" jail will be approximately 4,000. Thus, by early 1992, the total design capacity of the Harris County Jail facilities will be approximately 8,681 inmates.

5. The actual inmate population at the downtown central jail on July 31, 1989 was 6,926, or 197.6% of its overall design capacity. The actual inmate population at the Detention Center on July 31, 1989 was 1,160, or 149.4% of its overall design capacity. Thus, the total inmate population for the Harris County facilities on July 31, 1989 was 8,086, or 188.8% of the facilities' overall design capacity. See County Defendants Exhibits No. 26 admitted at the August 14, 1989 trial.

6. By far the largest classes of inmates at the Harris County Jail facilities are convicted felons ready for transfer to TDC and felony pretrial detainees. On July 31, 1989 there were 3,420 convicted felons ready for transfer to TDC and 2,340 felony pretrial detainees. A complete breakdown of the population on July 13, 1989 follows:

Pretrial Detainees:

Felony Charges	2,340
Misdemeanor Charges	155
Both Misdemeanor & Felony Charges	291
Other Pretrial Detainees	228
	3,014
County Prisoners:	
Serving County Time	820
Serving County Fine	81
Serving County Time with Open Charges	3
Serving County Fine with Open Charges	0
	904
Class C Misdemeanors Only:	
Class C Serving Fine	34
Class C with Open Charges	68
	102
Felony Convictions:	
Awaiting Delivery Orders	29
Convictions with Additional Charges	243
Convictions Awaiting Delivery Order Dates	3,420
Convictions Awaiting Appeal	80
Convictions Serving County Time/Fine	17
	3,789
TDC Parole Violators	30
Bench Warrant Prisoners	61
Fugitives	56
Civil District Court Detainees	6
Federal Prisoners	124
Immigration Prisoners	0

	277
TOTAL:	8, 086

7. The overcrowding problem at the Harris County Jail facilities is much more severe than the overall inmate-capacity figure of 188.8% indicates. Because County Defendants have steadfastly attempted to maintain appropriate classification and segregation of inmates, the population is not evenly distributed throughout the jail facilities. Very few cellblocks house less than 100% of their design capacity; most cellblocks house far in excess of the overall population figure of 188.8% of design capacity. In fact, many cellblocks house between 300% to 500% of their capacity. See County Defendants' Exhibit Nos. 15 and 39 admitted at the August 14, 1989 trial. Extreme overcrowding is the primary cause of the conditions of confinement listed below that inmates must endure at the Harris County Jail facilities.

8. Approximately 2,800-2,900 inmates must sleep on mattresses on the floor each night. See Testimony of Captain Don McWilliams at the August 14, 1989 trial.

9. Deputies are unable to control which inmates are allowed to sleep on bunks and which are relegated to the floor. Stronger inmates are free to impose their will upon weaker inmates. See testimony of McWilliams, supra; see also testimony of Michael Keating at the August 14, 1989 trial.

10. In some cellblocks, inmates form a "human carpet" in their attempt to find space to sleep on the floor. Some inmates sleep on the floor under fixed bunks, without enough clearance to even turn over during the night. See testimony of Steve Martin at the September 12, 1989 hearing.

11. The physical design of the central jail's cellblocks prevents a deputy from observing all inmates within a

cell without entering the cell to make a visual inspection. See testimony of Keating, supra.

12. The number of deputies on the jail staff is insufficient to assure the safety of all inmates under the present extreme crowding situation. Deputies do not always enter every cell each hour for a visual inspection as required by this Court's Order entered December 18, 1984. See testimony of Keating, supra. See also testimony of Perry Johnson, Michael Reese, Don McWilliams at the September 12, 1989 hearing.

13. There has been a great increase in the number of reported disciplinary violations. Prior to the overcrowding crisis, there was an average of 250 to 350 disciplinary violations reported per month. Now there are over 600 disciplinary violations reported each month, and deputies no longer report minor violations. See testimony of McWilliams, supra.

14. Frequently, one half of the plumbing within a cellblock is not operable. On occasion, none of the faucets in an entire cellblock works. See testimony of McWilliams, supra.

15. Ventilation in the central jail is very poor. There is a 10 to 15 degree difference in temperature between the inner and outer ring of a floor. The fact that many inmates are heavy smokers exacerbates the ventilation problem. In some cell-blocks the stench caused by the overcrowding of inmates is overwhelming. The walls are often slimy with humidity because of constant showering. See testimony of Keating, Martin, and Johnson, supra.

16. Fire safety in the central jail is severely compromised by the extreme overcrowding of the facilities. Housing areas are not protected by a sprinkler system. Thus, in the event of a major fire the only solution would be complete evacuation of all inmates. It would be virtually impossible to

evacuate the nearly 7,000 inmates housed on the twelve floors of the central jail safely and quickly. There is no second means of egress at the Detention Center. See testimony of Johnson and Keating, supra.

17. The Sheriff is unable to continuously supply inmates with basic necessities such as clothing, soap, and feminine hygiene. Some inmates are left naked with only sheets or towels to cover themselves while their clothes are being washed. Many inmates must launder their own underwear in the cellblock sink. See testimony of Keating and McWilliams, supra.

18. . The Sheriff has insufficient staff and equipment to provide appropriate food service for the current population. There are not enough trays to serve all inmates at once; therefore, trays must be immediately washed and recycled during breakfast and dinner until everyone is fed. It takes approximately three hours to feed all of the inmates in the central jail. Breakfast usually begins at about 3:30 a.m. and dinner begins at about 4:00 p.m. There is no longer enough room in the "day rooms" to feed all the inmates; thus, many inmates must eat their meals in their cell while sitting on the floor, on the toilet, in a shower stall, or on a bunk. Eating in the cells has contributed to sanitation problems. See testimony of Keating and McWilliams, supra.

19. The medical staff at the Harris County Jail facilities is unable to provide adequate medical care for the current population. Inmate requests for medical attention frequently are not granted for a month or more. On one occasion, a jail physician delayed full treatment of an inmate's ulcer because the physician simply did not believe the inmate when the inmate reported that he had blood in his vomit. As a result, the inmate died of a bleeding ulcer. Other cases of indifference were documented. The medical care provided to the inmates at the Harris County Jail facilities constitutes conscious indifference towards the inmates' serious medical needs. See testimony of Dr. Armond Start and Dr. Michael Sargant at the

September 12, 1989 hearing; see also testimony of Keating, McWilliams, Reese, supra.

20. A recent outbreak of a pneumococcal infection at the Harris county Jail facilities is directly related to the overcrowded conditions. Two inmates died from this infection and approximately 30 other were hospitalized or treated at the jail clinic. See testimony of Dr. Daniel Musher at the September 12, 1989 hearing.

21. The Harris County Pretrial Services Agency (PTSA) interviews approximately 95% of all inmates entering the Harris County Jail facilities to determine which inmates may qualify for pretrial release on personal bonds without sureties. A PTSA employee interviews the inmate to determine elements of the inmate's background relevant to the inmate's likelihood of appearing in court if released on a personal bond. PTSA has developed an objective system of "scoring" each inmate. A perfect score is 7; inmates with a score of 5 or above are considered good candidates for release on a personal bond and their application is forwarded to the appropriate judge. See testimony of Charles Noble at the August 14, 1989 trial.

22. In an average month, PTSA will interview approximately 1,700 inmates arriving with felony charges. Of the 1,700 interviewed, PTSA will forward approximately 485 to 585 applications to the appropriate state district judge. All of the applications forwarded to the district judge reflect inmates who, on an objective scale, would be good candidates for pretrial release on a personal bond. During an average month only 150 to 160 applications for personal bonds are approved. See testimony of Noble, supra.

23. While district judges are considering the release of persons generally accused of far more serious crimes requiring greater concern for public safety, the county judges have obviously given greater weight to PTSA recommendations than have the district judges. One-half of the district judges

approve fewer than 100 personal bonds per year. The director of PTSA testified that many district judges do not consider the great majority of applications for personal bond that are forwarded to them. For example, on a given day, one judge reviewed only three of the 53 applications presented to him relating to inmates who would be good candidates for release on personal bond. Of the three applications the judge reviewed, only one was approved. See, State Defendants' exhibit numbers 70 and 72. See also testimony of Noble, supra.

24. In light of credible testimony that district judges refuse to consider personal bonds for inmates who by objective criteria would be good candidates for release, this Court concludes that the restriction of liberty of such pretrial detainees is arbitrary and purposeless.

25. Ultimately, counsel for State Defendants and counsel for County Defendants admitted in open court that the conditions of confinement in the Harris County Jail facilities are unconstitutional. After considering the totality of the conditions of confinement in the Harris County Jail facilities, the Court finds that those conditions are cruel and unusual in violation of the Eighth and Fourteenth Amendments.

26. State Defendants' refusal to accept convicted felons ready for transfer to TDC has caused those inmates to suffer cruel and unusual punishment in the Harris County Jail facilities.

27. County Defendants have failed to provide a safe and suitable jail as required by the consent decree and the Court's subsequent remedial orders. Even if all TDC-ready prisoners were removed from the jail, the population would still exceed design capacity by approximately 400 inmates.

28. Because of the poor physical design of the central jail and the lack of a second means of egress from the Detention Center, the Court finds that the maximum

constitutional capacity for the Harris County Jail is its overall design capacity, or a total of 4,281 inmates. This Court's previous staffing order entered December 18, 1984 assumed that a 9-9-7 staffing ratio could adequately safeguard no more than the number of inmates the facilities were designed to house.

29. State Defendants acted under color of state, not federal, law when the implemented the scheduled admissions policy that caused the overcrowding crisis in the Harris County Jail facilities. State Defendants could have complied with the requirements of the Ruiz decree without refusing to accept prisoners. Federal authority did not require them to refuse to accept inmates from county jails. The most obvious alternative would have been to timely build new prison facilities. The Court described other alternatives in its May 12, 1989 Memorandum and Order. State Defendants' actions are fairly attributable to the State for purposes of the Fourteenth Amendment.

30. An actual controversy exists between County Defendants and State Defendants. County Defendants' assertion of the right of Plaintiffs via County Defendants' third-party complaint has allowed the applicable constitutional issues to be presented vigorously and cogently.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over Plaintiffs' supplemental complaint against State Defendants pursuant to 28 U.S.C. § 1343 (a) (3).

2. The Court has jurisdiction over Plaintiffs' requests for supplemental relief pursuant to the consent judgment entered in this case on February 4, 1975 and 28 U.S.C. § 1343 (a) (3).

3. The Court has jurisdiction over County Defendants' third-party complaint pursuant to 28 U.S.C. §§

1331, 1343 (a) (3) and 1651 (a). Moreover, the Court has ancillary jurisdiction over County Defendants' third-party complaint. See Owen Equipment and Erection Company v. Kroger, 437 U.S. 365, 375 at n. 18 (1978); Rogers v. Aetna Casualty and Surety Company, 601 F.2d 840, 843 at n. 4 (5th Cir. 1979); Wright & Miller, Federal Practice and Procedure: Civil, Ë 1444, at 223 n. 68 (West 1971).

4. Venue for Plaintiffs' supplemental complaint against State Defendants lies in this district because Plaintiffs' claims against State Defendants arose in this district. (See finding of fact 1.) 28 U.S.C. § 1391 (b).

5. Venue for County Defendants' third-party complaint against State Defendants lies in this district because their claims against State Defendants arose in this district. (See finding of fact 1.) 28 U.S.C. § 1391 (b). Moreover, State Defendants, as third-party defendants pursuant to Rule 14, may not contest venue. F&D, Inc. v. O'Hara & Kendall Aviation, Inc., 547 F.Supp. 44, 45 (S.D. Tex. 1982). See also Lone Star Package Car Co. v. Baltimore & O.R. Co., 212 F.2d 147 (5th Cir. 1954); Wright & Miller, Federal Practice and Procedure: Civil, § 1445 at 240 n. 14 (West 1971).

6. Although the Eleventh Amendment bars this Court from ordering State Defendants to obey state law, Pennhurst School & Hospital v. Halderman, 465 U.S. 89 (1984), the Court has jurisdiction to assure that State Defendants conform their conduct to federal constitutional standards. Ex parte Young, 209 U.S. 123 (1908).

7. This Court's jurisdiction is limited to "actual cases or controversies." Art. III, Ë 2, U.S. Const.; Flast v. Cohen, 392 U.S. 83 (1968). A corollary of this rule requires a party to have "standing" to assert its claims. The United States Supreme Court has noted that the "gist" of standing requires a litigant to allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which

sharpens the presentation of issues. . . ." Baker v. Carr, 369 U.S. 186, 204 (1962). In another context, the Supreme Court has held that a litigant must show some "injury to himself that is likely to be redressed by a favorable decision." Simon v. Eastern Kentuky Welfare Rights Organization, 426 U.S. 26, 38 (1976). Although litigants are not normally allowed to assert the rights of third parties, the Supreme Court has made it clear that this limitation is not constitutionally mandated. Craig v. Boren, 429 U.S. 190, 193 (1976). Instead, the limitation on a litigant's ability to assert the right of a third party is simply a "rule of self-restraint" based on "prudential objectives." Id. So long as a litigant asserts a sufficiently concrete interest in the outcome of its suit to meet the case or controversy requirement of Article III, a federal court may allow the litigant to assert the rights of a third party where the applicable constitutional questions have been and continue to be presented vigorously and `cogently'. . . ." Id at 194; see also Singleton v. Wulff, 428 U.S. 106, 112-16 (1976); Benjamin, 803 F.2d at 54.

8. In order to be entitled to relief under 42 U.S.C. § 1983, a party must prove: (1) that the defendant deprived him of a right secured by the Constitution or laws of the United States, and (2) that the defendant deprived him of that right under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980); Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978); Sims v. Jefferson Downs, Inc., 778 F.2d 1068, 1076 (5th Cir. 1985).

9. The Eighth Amendment, which prohibits cruel and unusual punishment, is applicable to the states through the Fourteenth Amendment. Rhodes v. Chapman, 452 U.S. 337, 344-45 (1981); Robinson v. State of California, 370 U.S. 660, 666 (1962).

10. Normally, the involvement of a state official "plainly provides the state action essential to show a direct violation of [a plaintiff's] Fourteenth Amendment . . . rights, whether or not the actions . . . were official authorized or

lawful." Flagg Brothers, 436 U.S. at 157 n.5 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970)). In an action pursuant to 42 U.S.C. § 1983, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 929 (1982). However, state officials who act solely pursuant to federal authority, act under color of federal, not state, law and are not subject to liability under 42 U.S.C. § 1983. District of Columbia v. Carter, 409 U.S. 418, 424 (1973); Askew v. Bloemker, 548 F.2d 673, 676-77 (7th Cir. 1976). A party deprived of his federally-protected rights by an official acting under color of federal law must state a claim under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and its progeny. See, Carter, 409 U.S. at 610. (See Finding of Fact 29.)

11. There is no static test by which to determine whether conditions of confinement are cruel and unusual. Rhodes, 452 U.S. at 346. The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Id. at 346 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). This Court need not separately weigh each of the challenged constitutional practices and conditions; instead, it must look to "the totality of the conditions" existing in the Harris County Jail facilities. Alberti v. Klevenhagen, 790 F.2d 1220, 1224 (5th Cir. 1986) (citing Ruiz v. Estelle, 679 F.2d 1115, 1139 (5th Cir.), modified on other grounds, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). "The totality of conditions of confinement does not offend the Constitution unless prison conditions are cruel and unusual, not merely harsh and restrictive." Alberti, 790 F.2d at 1224 (quoting Ruiz, 679 F.2 at 1140).

12. In determining the constitutionality of the confinement of pretrial detainees, the Court must apply the Due Process Clause of the Fourteenth Amendment, not the Eighth

Amendment. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (citing Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977)). Under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt. Bell, 441 U.S. at 535. However, not every disability imposed during pretrial detention amounts to "punishment" in the constitutional sense. Id. at 537. For example, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Id. at 539. Conversely, if a restriction or condition is not reasonably related to a legitimate goal - if it is arbitrary or purposeless - this Court may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees. Id. at 539.

13. In determining the amount of bail required to secure the release of an accused prior to trial, the Harris County Courts at law and District Courts are governed in the exercise of their discretion by the Constitution and by the following rules:

> 1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
>
> 2. The power to require bail is not to be so used as to make it an instrument of oppression.
>
> 3. The nature of the offense and the circumstances under which it was committed are to be considered.
>
> 4. The ability to make bail is to be regarded, and proof may be taken upon this point.

5. The future safety of a victim of the alleged offense may be considered.

Tex. Code Crim. Proc. Ann. art. 17.15 (Vernon Supp. 1989).

The County Courts at law and District Courts also have the discretion to release a defendant on his personal bond without sureties or other security. Tex. Code Crim. Proc. Ann. art 17.03 (Vernon 1977). The primary purpose of an appearance bond is to secure the presence of a defendant in court at his trial. Ex parte Ivey, 594 S.W.2d 98 (Tex. Crim. App. 1980).

14. Pretrial detainees are entitled to reasonable medical care unless the failure to supply the care is reasonably related to a legitimate governmental objective. Cupit v. Jones, 835 F.2d 82 (5th Cir. 1987).

15. Convicted inmates are entitled to medical care that does not constitute deliberate indifference to their serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

16. Upon a finding that State Defendants and County Defendants are liable for the unconstitutional conditions of confinement presently existing in the Harris County jail facilities, the Court must fashion "the least intrusive remedy that will still be effective." Ruiz, 679 F.2d at 1145. This proposition does not mean that the Court must exhaust all conceivable avenues of relief against County Defendants before imposing relief against State Defendants. See, Benjamin, supra at 53. State Defendants and County Defendants deserve the same respect from the Court.

17. Under Texas law, the county sheriffs and commissioners courts are the keepers of the jails. Tex. Local Gov't Code Ann. §§ 351.001-.015 and §§ 351.041-.042 (Vernon 1988).

18. Under Texas law, TDC (now TDCJ, or the Texas Department of Criminal Justice) is responsible for the confinement of convicted felons. Tex. Penal Code Ann. §§ 12.32-.34 (Vernon 1974 and Cumm. Supp. 1989); Tex. § Crim. Proc. Ann. art. 42.09 (Vernon Supp. 1989).

19. Prior to September 1, 1989, the effective date of H.B. 2335, the transfer of convicted felons from the Harris County Jail to TDC was governed by the interplay between Tex. Code Crim. Proc. Ann. art 42.09 (West Supp. 1989) and Tex. Rev. Civ. Stat. Ann. art. 6166r (West 1970). Sections 2 and 3 of Article 42.09 of the Texas Code of Criminal Procedure explicitly provide that convicted felons shall be committed to TDC under certain circumstances pending, or at the conclusion of, an appeal. Sections 1 and 4 of Article 42.09, however, appear to envision at least a temporary stay at the jail when a felon does not appeal his conviction or when a felon appeals his conviction but his sentence is for a term of ten years or less. In the past, a convicted felon's temporary confinement in the Harris County Jail created no serious problems because Article 6166r required TDC to make suitable provisions for the "safe and speedy transportation of prisoners from counties where sentenced to the State penitentiary. . . ."

20. H. B. 2335 made two important changes with respect to the transfer of convicted felons from the county jails to TDC. First, section 3.04 of H.B. 2335 deleted the requirement that TDC's acceptance of convicted felons be "speedy." Second, section 3.06 of H.B. 2335 requires the Texas Board of Criminal Justice to adopt and enforce an allocation formula that limits the number of convicted felons the institutional division will accept from the counties until sufficient capacity is available in the institutional division. H. B. 2335 did <u>not</u>, however, relieve State Defendants of their responsibility for the confinement of convicted felons. The State of Texas is free to allocate the admissions of felons into the penitentiary in virtually any manner it chooses so long as the allocation does not result in the cruel and unusual punishment of inmates. However,

when it becomes clear that convicted felons are being confined in conditions that violate the Eighth Amendment, the relevant inquiry becomes who is responsible for the confinement of these inmates. Fortunately, H.B. 2335 provides a clear answer to this inquiry. Section 1.02 (a) (1) provides, "The department [TDCJ, formerly TDC] is the state agency with primary responsibility for . . . the confinement, supervision, and rehabilitation of felons. . . ." Thus, the fact that the State of Texas has "virtually complete freedom to decide who will be responsible" for the confinement of felons provides no shield from liability for State Defendants in this case because state law clearly places the primary responsibility for the confinement of felons upon them. See Bush v. Viterna, 795 F.2d 1203, 1209 (5th Cir. 1986).

21. In essentially the same circumstances, the Fifth Circuit Court of Appeals has held that state officials cannot disclaim responsibility for cruel and unusual conditions of confinement of prisoners committed to their custody on the ground that they have no control over the operation of local jails. Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982). Subsequently, the Second Circuit came to the same conclusion. See Benjamin, 803 F.2d at 51. Bush v. Viterna supra did not purport to overrule Stewart v. Winter. In fact, the Bush panel could not have overruled Stewart because the Fifth Circuit Court of Appeals adheres to the rule that only intervening Supreme Court authority or the Court sitting en banc can overrule a previous panel decision. Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); Fulford v. Klein, 529 F.2d 377 (5th Cir. 1976), majority opinion adopted by en banc court, 550 F.2d 342 (5th Cir. 1977). The Court is not aware of any intervening en banc or Supreme Court authority purporting to overrule Stewart. Thus, to the extent that H.B. 2335 attempts to exculpate State Defendants from liability for the cruel and unusual punishment of convicted felons incarcerated at county jails, it is ineffective.

22. A convicted felon ready for transfer to TDC is defined as:

(a) An individual who is being confined pursuant to a judgment of conviction and sentence imposed in a felony case pursuant to a plea of guilty or nolo contendere (such individual being deemed "ready for transfer" on the date of sentencing); or

(b) An individual who is being confined pursuant to a judgment of conviction and sentence imposed in a felony case pursuant to the verdict or a jury or judge after a plea of not guilty by the defendant (such individual being deemed "ready for transfer" on (1) the date the defendant is taken into custody after affirmance of his or her conviction, if the defendant appeals the conviction and is released on bail pending disposition of the appeal, pursuant to Tex. Crim. Proc. Code Ann. § 42.09(2) (Vernon Supp. 1989); or on (2) the date the defendant requests transfer to the TDC, if the defendant is convicted of a felony and his sentence is a term of ten (10) years or less and he gives notice of appeal, pursuant to Tex. Crim. Proc. Code Ann. § 42.09(4) (Vernon Supp. 1989); or (3) the date notice of appeal is filed or the time for filing notice of appeal passes, whichever date first occurs, if a defendant is convicted of a felony and sentence to death, life or a term of more than ten (10) years in the TDC pursuant to Tex. crim.

Proc. Code Ann. § 42.09(3) (Vernon Supp. 1989)); and

(c) the individual has no other criminal detainers or criminal cases pending in county, state or federal trial courts; and

(d) all paperwork customarily required to transfer the individual to TDC has been satisfactorily completed pursuant to Tex. Crim. Proc. Code Ann. §§ 42.03(3), (4) (Vernon 1979) and 42.09(8) (Vernon Supp. 1989).

CONCLUSION

As indicated by the findings and conclusions above, the Court has determined that State Defendants and County Defendants are liable for the unconstitutional conditions of confinement in the Harris County Jail facilities.

The Fifth Circuit Court of Appeals has correctly bifurcated this case so that authority to decide any relief against State Defendants that affects the management or operations of the Department of Corrections rests with Judge Justice, the presiding judge in the Ruiz prison case. Despite the urgency for immediate remedy amply demonstrated by this record, the Court concludes that it should delay the imposition of relief against County Defendants so that the relief formulated by Judge Justice against State Defendants may be coordinated and interwoven with the remedial action required of the County. This appears to be the most logical approach the Court can take to determine "the least intrusive remedy that will still be effective." The Court envisions the issuance of a joint order or simultaneous orders of the judges.

But the solution to unconstitutional conditions in state penitentiaries and local jails requires more than the joint effort of two federal judges. Just decisions should be made by those who have the primary responsibility to make them -- the appropriate state and county officials. The Governor and the County Judge of Harris County have shown a willingness to find solutions fair to the citizenry of Harris County and the State and true to the constitution. Prior to the recent evidentiary hearings, Governor Clements and County Judge Lindsey, their staffs and attorneys, together with the court appointed monitors and counsel for the inmates, met in a marathon session to resolve differences and to find solutions to the growing national problem of prison overcrowding, which is particularly acute here.

The evidentiary hearings themselves were conducted in a dispassionate, orderly and thorough fashion. Early rancor and emotionalism dissipated in the face of an evidentiary record in which much was undisputed. In light of these factors, meaningful dialogue among the parties should continue.

Time will be required for Judge Justice to review proceedings here. This interval can be used by the parties to make every attempt to resolve issues without unnecessary judicial intervention.

The overcrowding in the Harris County facilities is extreme. Large and immediate reductions in inmate population are in order. The Court suggests that the parties look to the large groups of transfer-ready felony inmates, pretrial felony detainees and parole-eligible prisoners for such reductions. The state judiciary might be consulted so that recognition be given to the realistic policy of personal recognizance release of pretrial detainees as a more palpable alternative to the early release on parole of a like number of convicted felons by the use of the Texas Prison Management Act. Obviously all other means and options must be carefully scrutinized in the process. Accordingly, it is hereby

ORDERED that Plaintiffs' motion for leave to file a supplemental complaint is GRANTED but Plaintiffs' request to join additional parties is DENIED. Allegations in the supplemental complaint are STRICKEN insofar as they apply to new parties. It is further

ORDERED that State Defendants are liable to County Defendants on County Defendants' third-party complaint. It is further

ORDERED that State Defendants are liable to Plaintiffs on Plaintiffs' supplemental complaint. It is further

ORDERED that County Defendants' third-party complaint and Plaintiffs' supplemental complaint are TRANSFERRED to the Honorable William Wayne Justice for proceedings in accordance with the mandamus opinion of the Fifth Circuit Court of Appeals entered in this case. It is further

ORDERED that the Special Master arrange a meeting of all the principals and parties involved in this case in order to facilitate a settlement regarding the appropriate relief to be imposed.

SIGNED in Houston, Texas, this 25th day of September, 1989.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX Z

Tex Gov't Code § 499.071. Allocation formula (Formerly Art. 6166a-4 (a) - (b).)

(a) The Texas Board of Criminal Justice shall develop, adopt, and enforce an allocation formula that fairly and equitably allocates to each county or group of counties served by a community corrections and supervision department the number of institutional division admissions allocated to the county or counties until sufficient capacity is available in the institutional division. In devising the formula, the board shall consider relevant factors for each county or group of counties served by a department and shall assign weights to those factors as determined appropriate by the board. The factors shall include but are not limited to:

(1) the percentage of prison admissions for the entire state that were used by the county or counties in the preceding 12 months;

(2) the percentage of the state's violent index crime that occurred in the county or counties in the preceding 12 months;

(3) the percentage of the state's total index crime that occurred in the county or counties in the preceding 12 months;

(4) the percentage of the state's total arrests under the Texas Controlled Substances Act (Article 4476-15, Vernon's Texas Civil Statutes) that occurred in the county or counties in the preceding 12 months;

(5) the percentage of the state's population residing in the county or counties; and

(6) the percentage of the state's total unemployment in the county or counties.

(7) the percentage of all defendants serving sentences for felonies who are paroled from the institutional division, a jail in this state, a federal correctional institution, or a jail or correctional institution in another state in the preceding 12

months and who were released to reside in the county or counties.

(b) If the board is unable to obtain for a factor listed in Subsection (a) information for the preceding 12-month period, the board shall consider the most recent information available for that factor.

(c) The board shall revise the formula annually.

APPENDIX AA

PERTINENT STATUTORY CHANGES ENACTED BY H.B. 93

TEXAS GOVERNMENT CODE CHAPTER 499

SUBCHAPTER F. PROCEDURES FOR REDUCING COUNTY JAIL BACKLOG[1]

§ 499.121. Legislative Declaration; Mandamus

(a) The legislature declares that until September 1, 1995, the institutional division shall continue to perform its duty to accept inmates only as provided by the allocation formula established under Section 499.071.[2]

(b) The legislature declares that until September 1, 1995, a county shall continue to perform its duty to confine and maintain under suitable conditions and at the county's own expense each inmate eligible for transfer from the county to the institutional division, until the date the inmate is actually accepted into custody by the institutional division. This subsection does not take effect if the County of Nueces et al. v. Texas Board of Corrections, et al., in the 250th Judicial District Court of Travis County, Texas, Cause No. 452,071 and Harris County, Texas v. the State of Texas, et al., in the 126th District Court of Travis County, Texas, Cause No. 475,468 are settled by written agreement on or before the 31st day after the effective date of this article.

(c) The legislature declares that on and after September 1, 1995, the institutional division has a duty to accept, not later than the 45th day after the date on which all processing required for transfer has been completed, each inmate confined in a

---

[1] All the provisions set forth below were newly enacted by H.B. 93.

[2] This refers to Section 499.071 of the Texas Government Code, which is set forth in App. Z to the Petition.

county jail while under an order of commitment to the institutional division.

(d) The duties provided by this subchapter may be enforced by an action in mandamus.

§ 499.122. Inmate Count

The Commission on Jail Standards shall analyze monthly the population of each jail in this state that is the jail for a qualifying county and determine the number of inmates confined in the jail who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom all paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer have been completed. The commission may not consider in determining the population of the jail under this section any inmate who is in the jail after having been transferred from another jail and for whom the commission has made payment under this subchapter.

§ 499.123. Payment

(a) Not later than the 32nd day after the effective date of this subchapter, the Commission on Jail Standards shall determine for each jail in this state that is the jail for a qualifying county the number of inmates confined in the jail on April 1, 1991, who were awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer had been completed on that date.

(b) A qualifying county is entitled to payment from the Commission on Jail Standards as compensation to the county for confining the number of inmates determined as ready for transfer under Subsection (a) at an amount per inmate to be determined

by dividing into $11.5 million the total number of inmates in jails that are the jails for qualifying counties under Subsection (a) confined by qualifying counties. The commission shall make the payment under this subsection on or before January 15, 1992.

(c) Not later than September 10, 1993, the Commission on Jail Standards shall determine for each jail in this state that is the jail for a qualifying county the number of inmates confined in the jail on September 1, 1993, who were awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer had been completed, as determined under Section 499.122, on that date.

(d) A qualifying county is entitled to payment from the Commission on Jail Standards as compensation to the county for confining the number of inmates determined as ready for transfer under Subsection (c) at an amount per inmate to be determined by dividing the total number of inmates, in county jails that are the jails for qualifying counties under Subsection (c) confined by qualifying counties into $11.5 million. The commission shall make the payment under this subsection on or before January 15, 1994.

§ 499.124. Emergency Overcrowding Relief.

(a) From the effective date of this subchapter until August 31, 1993, for each month in which the number of inmates confined in a jail that is the jail for a qualifying county who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer have been completed, as determined under Section 499.122, is greater than 50 percent of the number of such inmates confined in the jail on April 1, 1991,

as determined under Section 499.123, the Commission on Jail Standards shall pay to a qualifying county for each inmate in excess of 50 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmate in excess of 210 percent of the April 1, 1991, number for each day of confinement the sum of $30.

(b) From September 1, 1993, until September 1, 1995, for each month in which the number of inmates confined in the jail that is the jail for a qualifying county who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer have been completed, as determined under Section 499.122, is greater than 25 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123, the Commission on Jail Standards shall pay to a qualifying county for each inmate in excess of 25 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmate in excess of 210 percent of the April 1, 1991, number for each day of confinement $30.

§ 499.125. Transfer of Felony Backlog

(a) If a state or federal court determines that conditions in a county jail are unconstitutional, and if on or after October 1, 1991, the percentage of inmates in the jail awaiting transfer to the institutional division is 20 percent or more of the total number of inmates in the jail, the commission shall transfer inmates from the jail to an appropriate jail, detention center, work camp, or correctional facility, but only to the extent necessary to bring the county into compliance with court orders or to reduce the percentage of inmates in the jail awaiting transfer to the institutional division to less than 20 percent of the total number of inmates in the jail.

(b) The Commission on Jail Standards is liable to counties for payment of the costs of transportation for and maintenance of transferred inmates. Costs paid to a county shall be paid into the treasury of the county operating the facility receiving the inmates. The costs for maintenance of an inmate for which the commission is liable under this section are:

> (1) the actual costs, as determined by the agreement between the board and the officer or governing body authorized by law to enter into contracts but only if Harris County, Texas v. the State of Texas, et al., in the 126th District Court of Travis County, Texas, Cause No. 475,468 is settled by written agreement on or before the 31st day after the effective date of this subchapter; or
>
> (2) if the suit described by Subdivision (1) of this subsection is not settled within the period specified by the subdivision, for each inmate for each day the first $20 of actual costs and one-half of costs that are in excess of $20, with the transferring county liable to the operators of the receiving facility for all costs are [sic] not paid by the state.

(c) If the board determines that a county is not reasonably utilizing its available certified jail beds, the payments authorized by this section shall be withheld to the extent necessary to equal the cost of the unutilized beds.

§ 499.126. Definition

(a) In this subchapter, "qualifying county" means a county that:

(1) on or after the effective date of this subchapter does not initiate or become a party to a suit against the state or a state agency or state official, the subject of which is the reimbursement of the county for confinement of inmates in

the county jail who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision; and

(2) if, before the effective date of this subchapter, it was a party to a suit in state court described by Subdivision (1), has before the 31st day after the effective date of this subchapter:

(A) had the county's suit vacated and dismissed by the court:

(B) had the county's suit abated by the court, by entry of an abatement order that specifically provides that:

(i) the suit may not be reactivated except before September 1, 1997, and except on a finding by the court that the state has substantially failed to perform a duty imposed under this subchapter;

(ii) the county is barred from any claim for reimbursement for the cost of confining inmates on and after the effective date of this subchapter and until September 1, 1995, other than reimbursement specified in this subchapter; and

(iii) if the suit is not reactivated before September 1, 1997, the court shall vacate and dismiss the suit on that date; or

(C) had the county's suit settled by written agreement.

(b) For the purposes of this section, a court retains jurisdiction over a case in which the court has entered an abatement order during the period in which the case is abated.

APPENDIX BB

THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

July 9, 1987

Honorable Gary Garrison
Ector County Attorney
Courthouse, Room 218
Odessa, Texas 79761

Opinion No. JM-743

Re: Liability for medical costs of an individual in a county jail awaiting a hearing for violation of parole conditions

Dear Mr. Garrison:

You ask whether the Texas Department of Corrections or the county of incarceration is responsible for the payment of medical care for a parole violator held in county jail pending a parole violation hearing.

The Adult Parole and Mandatory Supervision Law defines parole and mandatory supervision as the release of a prisoner from imprisonment but not from the legal authority of the state. Code Crim. Proc. art. 42.18, §2. Every prisoner on parole or mandatory supervision remains in the legal custody of the institution from which he was released but is subject to the orders of the Board ofPardons and Paroles. Code Crim. Proc. art. 42.12, §15(f)(3). If there is reason to believe that a parolee

has violated a condititon of his parole, the Board of Pardons and Paroles may issue a warrant authorizing the officers named in the warrant to take the parolee into "actual custody." Code Crim. Proc. art. 42.12, §21(a). The due process requirements of Morrissey v. Brewer, 408 U.S. 471 (1972), require that the parolee be given a revocation hearing at or near the location of the alleged violation. Pending the hearing on a charge of parole violation or violation of conditions of mandatory supervision, "a prisoner returned to custody shall remain incarcerated." Code Crim. Proc. art. 42.12, §21(a); art. 42.18, §14(a); 37 Texas Administrative Code §145.45(g). The Board of Pardons and Paroles may required a county sheriff to accept a prisoner of the board pending a parole revocation hearing. Representatives of a county where a parolee is detained on the basis of a prerevocation warrant issued by the Board of Pardons and Paroles may not transfer the parolee to the Texas Department of Corrections before completion of waiver of the required hearing. Attorney General Opinion JM-615 (1987).

Counties are liable for medical expenses of prisoners "confined in or kept under guard in the county jail." Code Crim. Proc. art. 104.002. Although there is an exception in article 104.002 for prisoners transferred from another county "on a change of venue, for safekeeping, or for a habeas corpus hearing," there is not exception for prisoners awaiting hearings on parol revocation. The Texas Department of Corrections is responsible for the medical care of prisoners "confined therein." V.T.C.S. art. 6166g. See generally Attorney General Opinion JM-730. You suggest that because a parolee is in the legal custody of the Department of Corrections, he should be considered to be "confined" in the Department of Corrections rather than county jail for purposes of determining liablity for medical care.

Article 6166g makes the Texas Department of Corrections responsible for the medical care "of prisoners confined therein." Cf. Attorney General Opinion JM-580 (1986) (authority of TDC to asume medical cost of hospitalization of infant born to an inmate). Even though a prisoner incarcerated in a county jail pending a parole violation hearing is in the legal custody of the Department of Corrections he is in the actual custody of the county jail. We find no basis for construing the term "confined therein" in article 6166g to be synonymous with legal custody. Absent any indication of contrary legislative intent, we must read "confined therein" in its ordinary meaning. Gov't. Code §311.011(a) (words shall be construed according to common usage). The ordinary meaning of "confine" is "to restrain within limits." Webster's New International Dictionary (2d ed.). See Attorney General Opinion JM-730. A prisoner incarcerated in a county jail is not confined in the department of corrections. We conclude, therefore, that a county is responsible for medical care for a parole violator incarcerated in a county jail pending a parole revocation hearing pursuant to article 104.002.

SUMMARY

Medical care for a parole violator incarcerated in a county jail pending a parole revocation hearing is the responsibility of the county under the provisions of article 104.002 of the Code of Criminal Procedure.

Very truly yours,

/s/ JIM MATTOX
Attorney General of Texas

MARY KELLER
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special ASsistant Attorney General

RICK GILPIN
Chariman, Opinion Committee

Prepared by Nancy Sutton and
Sarah Woelk
Assistant Attorney General

APPENDIX CC

THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

July 9, 1987

Honorable Russell P. Brooks
Hunt County Attorney
P.O. Box 1097
Greenville, Texas 75401

Opinion No. JM-730

Re: Responsibility for medical expenses incurred on behalf of an indigent prisoner transferred from a county jail to the Texas Department of Corrections on a bench warrant

Dear Mr. Brooks:

You ask about payment of medical expenses for an indigent prisoner incarcerated in a county jail. Specifically, you ask about a prisoner who was serving a sentence in the Texas Department of Corrections (TDC) and was transferred from TDC to a county jail, pursuant to a bench warrant, in order to stand trial on a felony charge. While he was in the county jail, his jaw was broken and he underwent surgery at a local hospital. You ask whether TDC or the county jail is liable for his medical expenses.

Article 6166g, V.T.C.S., provides:

> The Texas [Board of Corrections], together with the [director] hereinafter provided for, shall be vested with the exclusive management and control of the [Department of Corrections], and all properties belonging thereto, subject only to the limitations of this Act, and shall be responsible for the management of the affairs of the [Department of Corrections] and for the proper care, treatment, feeding, clothing and management of the prisoners confined therein.

The statute requires TDC to provide medical care for "prisoners confined therein." See generally Attorney General Opinion JM-580 (1986).

Article 104.002(a) of the Code of Criminal Procedure governs liability for expenses for the care of persons incarcerated in county jails:

> Except as otherwise provided by this article, a county is liable for all expenses incurred in the safekeeping of prisoners confined in the county jail or kept under guard by the county. If a prisoner is transferred to a county from another county on a change of venue, for safekeeping, or for a habeas corpus hearing, the county transferring the prisoner is liable for the expenses described by this article. (Emphasis added).

Article 104.002(a) makes counties liable for medical care provided to indigent prisoners confined in county jail. Attorney

General Opinion Nos. JM-643 (1987); JM-487 (1986); H-703 (1975); M-870 (1971).

The prisoner in question was transferred from TDC to the county jail pursuant to a bench warrant. A bench warrant is the common law writ used to bring a convict confined in the penitentiary to trial in another case. Ex part Lowe, 251 S.W. 506, 507 (Tex. Crim. App. 1923); Gaines v. State, 53 S.W. 623, 624 (Tex. Crim. App. 1899). Both article 6166g, V.T.C.S., and article 104.002 of the Code of Criminal Procedure discuss liability for prisoners "confined in" prisons and jails, respectively. The ordinary meaning of "to confine" is "to restrain within limits." Webster's New International Dictionary (2d ed.). Words in statutes should be given their ordinary meanings. Gov't. Code art.10(i), §311.011(a). Therefore, we construe "confined" in article 6166g and article 104.002 to refer to a prisoners' physical presence in a prison or jail. Thus, the prisoner in question was no longer "confined in" TDC while he was in the county jail. Cf. Ex. parte Hudson, 655 S.W.2d 206, 208 (Tex. Crim. App. 1983) (prisoner may receive credit toward TDC sentence for time spent in county jail if TDC places a "hold" on prisoner); Ex parte Alvarez, 519 S.W.2d 440, 443 (Tex. Crim. App. 1975). Rather, he was "confined in" the county jail. See also Code Crim. Proc. art. 104.002 (specifically excepting prisoners brought from another county on a change of venue, for safekeeping, or for a habeas corpus hearing). Therefore, article 104.002 of the Code of Criminal Procedure rather than article 6166g, V.T.C.S., governs liability for medical expenses of the indigent prisoner you describe.

You also ask whether the enactment in 1985 of the Indigent Health Care and Treatment Act, article 4438f, V.T.C.S., affects our answer to your question. Both article 104.002 of the Code of Criminal Procedure and article 6166g are specific statutes governing indigent health care in specific

situations. The Indigent Health Care Act governs indigent health care generally. We concluded in Attorney General Opinion JM-643 (1987) that the Indigent Health Care Act does not affect the application of article 104.002 of the Code of Criminal Procedure. Similarly, we conclude that the Indigent Health Care Act does not affect application of article 6166g, V.T.C.S. See American Canal Co. of Texas v. Dow Chemical Co., 380 S.W.2d 662, 666 (Tex. Civ. App. - Houston 1964, writ dism'd).

SUMMARY

A county is liable for the medical expenses of a prisoner confined in county jail who was transferred from the Texas Department of Corrections to the county jail pursuant to a bench warrant.

Very truly yours,

/s/ JIM MATTOX
Attorney General of Texas

MARY KELLER
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chariman, Opinion Committee

Prepared by Sarah Woelk
Assistant Attorney General

APPENDIX DD

37 TAC Ch. 152 (in pertinent part):

§ 152.1. Purpose. Texas Civil Statutes, Article 6166a-4, requires the board to adopt and enforce an allocation formula to fairly and equitably allocate to each county the Available Institutional Division admissions until sufficient capacity is available in the Institutional Division to accept all prisoners eligible for transfer to the Institutional Division. An annual determination by the board that there is insufficient capacity in the Institutional Division to accept all prisoners from Texas county jails who are eligible for transfer into the Institutional Division as soon as they become eligible, shall make it necessary to adopt and enforce such a formula.

§ 152.2. Definitions and Exceptions.

(a) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Available institutional division admissions - The total number of beds available within the Institutional Division for intake of prisoners is based upon the estimated rate of release of prisoners from the Institutional Division, minus .03333 of those beds which is adequate to allow the Institutional Division to expeditiously receive from the

counties any new prisoners who are sentenced to death, or who are recaptured escapees, pre-parole violators, Institutional Division prisoners returning from federal bench warrants, interstate corrections compact transfers, and out-of-state parole violators. Therefore, the number of admissions available is based upon an estimated rate of prisoner flow through the Institutional Division to maintain the Institutional Division capacity.

(2) Institutional division capacity - The total number of beds available for use within the Institutional Division in accordance with the limitations on capacity and its use imposed by federal court orders in *Ruiz v. Lynaugh*, Number H-78-987 (Southern District Texas, Houston Division.) Available institutional capacity at the time of the adoption of this section will be no more than 43,951. When the Lewis unit is populated and in operation, available Institutional Division capacity will be no more than 49,681.

(b) The Institutional Division may suspend or cancel admissions when the acceptance or transport of prisoners would be unsafe, such as in cases of extremely severe weather or civil disturbance, or would cause non-compliance with federal court orders. The Institutional Division is not required to make up for admissions so suspended or canceled. On days that the Institutional Division is closed due to holidays, the

number of admissions is decreased by the number of days of closure multiplied by the current number of daily admissions. The balance of admissions for the weeks is prorated out to the counties based upon their allocated percentage of intake.

APPENDIX EE

NO. 475,468

HARRIS COUNTY, TEXAS	§	IN THE DISTRICT
	§	COURT
Plaintiff and Relator,	§	
	§	
V.	§	
THE STATE OF TEXAS; ANN	§	
RICHARDS, GOVERNOR OF THE	§	
STATE OF TEXAS; TEXAS	§	
DEPARTMENT OF CRIMINAL	§	
JUSTICE; JAMES LYNAUGH,	§	
DIRECTOR; TEXAS BOARD	§	
OF CRIMINAL JUSTICE;	§	
CHARLES T. TERRELL; JERRY	§	TRAVIS COUNTY,
H. HODGE; F. L. STEPHENS;	§	TEXAS
BEN GALLANT, JR.; JAMES	§	
ELLER; MAMIE MOORE	§	
PROCTOR; ROBERT MANN;	§	
AND ALLAN B. POLUNSKY;	§	
AS MEMBERS OF THE TEXAS	§	
BOARD OF CRIMINAL	§	
JUSTICE,	§	126TH JUDICIAL
	§	DISTRICT
Defendants and Respondents	§	

AGREED ORDER VACATING JUDGMENT

On the date indicated below came on to be heard the joint motion of the Plaintiff/Realtor, the Harris County, Texas, and the Intervenor, Montgomery County, Texas; together with the Defendants/Respondents, the State of Texas; Ann Richards, Governor of the State of Texas; Texas Department of Criminal Justice; James Lynaugh, Director; Texas Board of Criminal Justice; Charles T. Terrell; Jerry H. Hodge; F.L. Stephens; Ben

Gallant Jr.; James Eller; Maime Moore Proctor: Robert Mann; and Allen B. Polunsky; as members of the Texas Board of Criminal Justice for vacation of the judgment entered by this Court on August 2, 1991. The Court, having considered the said motion, finds that the parties have satisfactorily compromised and settled all matters in dispute in this cause. The Court further finds that the vacation of the judgment is conditional on the Defendants/Respondents' performance of the requirements of the Agreement, attached to the motion as Attachment A, and on the Plaintiff/Realtor and Intervenor being able to file a motion with this Court to reinstate the judgment, attached to the motion as Exhibit C to Attachment A, if Defendants/Respondents fail to perform under the terms of the Agreement. The Court further finds that the vacation of judgment is conditional on the agreement of the parties that if the Court determines that the Defendants/Respondents have violated the terms of the Agreement, then the Court shall reinstate and enter the original judgment, attached to the motion as Exhibit C to Attachment A. Further, the vacation of the judgment is, and shall be, conditional on the agreement of the parties that if the Court determines that the Defendants/Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment as provided, the Court shall enter the judgment attached to the motion as Exhibit C to Attachment A. The Court further finds that the Defendants/Respondents reserve their right to appeal if the judgment is reinstated or the new judgment is entered. The Court further finds that the motion should be granted.

It is therefore, ORDERED, ADJUDGED, and DECREED that the judgment entered by this Court on August 2, 1991, in the above-styled and numbered cause be, and the same hereby is, vacated subject to being reinstated if the Defendants/Respondents fail to perform the requirements of the Agreement attached to the motion as Attachment A, or, in the alternative, if the Court determines that the Defendants/Respondents have violated the terms of the

Agreement, and determines that it is unable to reinstate the judgment, the entry of the new judgment attached to the motion as Exhibit C to Attachment A.

SIGNED and ENTERED this 25th day of October 1991.

/s/
JUDGE JOSEPH HART
126th Judicial District

APPROVED AS TO FORM AND SUBSTANCE:

MIKE DRISCOLL
HARRIS COUNTY ATTORNEY
1001 Preston, Suite 634
Houston, Texas 77002-1891
(713) 755-7961

By: /s/
FRANK SANDERS
State Bar No. 17588500
Assistant County Attorney

ATTORNEYS FOR HARRIS COUNTY, TEXAS

D.C. JIM DOZIER
MONTGOMERY COUNTY ATTORNEY
301 North Main Street, Suite 300
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(409) 539-7828

By: /s/
STEVE MCKEITHEN
State Bar No. 13700550
Assistant County Attorney

ATTORNEYS FOR INTERVENOR
MONTGOMERY COUNTY, TEXAS

DAN MORALES
ATTORNEY GENERAL OF TEXAS

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2080

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Executive Assistant Attorney General

By: /s/
DAN MORALES
State Bar No. 14417450

ATTORNEYS FOR RESPONDENTS

APPENDIX FF

NO. 452,071

THE COUNTY OF NUECES TEXAS, ET AL. Relator	§	IN THE DISTRICT COURT
V.	§	
TEXAS BOARD OF CORRECTIONS; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; DERALYN R. DAVIS; JAMES ELLER; DENNIS R. HENDRIX; JOE V. LAMANTIA; ROBERT MANN; ALLAN B. POLUNSKY; JAMES A. LYNAUGH	§	TRAVIS COUNTY, TEXAS
Respondents	§	250TH JUDICIAL DISTRICT

AGREED ORDER VACATING JUDGMENT

On the date indicated below came on to be heard the joint motion of the Realtor, the County of Nueces, Texas; and the Intervenors, The County of Travis, Texas, the County of Tarrant, Texas, The County of Dallas, Texas, The County of Victoria, Texas, The County of Collin, Texas, The County of Hunt, Texas, The County of Bexar, Texas, The County of El Paso, Texas, The County of Lubbock, Texas, The County of Galveston, Texas, and The County of Hidalgo, Texas; together with the Respondents, Texas Board of Corrections, Charles T. Terrell, Jerry H. Hodge, F.L. Stephens, Deralyn Davis, James Eller, Dennis R. Hendrix, Joe V. LaMantia, Jr., Robert Mann, Allan B. Polunsky, and James A. Lynaugh for vacation of the judgment entered by this Court on August 22, 1990. The Court,

having considered said motion, finds that the parties have satisfactorily compromised and settled all matters in dispute in this cause. The Court further finds that the vacation of the judgment is conditional of the Respondents' performance of the requirements of the Agreement, attached to the motion as Attachment A, and on the Relator or, any or all of, the Intervenors being able to file a motion with this Court to reinstate the judgment, attached to the motion as Exhibit D to Attachment A, if Respondents fail to perform under the terms of the Agreement. The Court further finds that the vacation of judgment is conditional on the agreement of the parties that if the Court determines that the Respondents have violated the terms of the Agreement, then the Court shall reinstate and enter the original judgment, attached to the motion as Exhibit D to Attachment A. Further, the vacation of the judgment is, and shall be, conditional on the agreement of the parties that if the Court determines that the Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment as provided, the Court shall enter the Judgment attached to the motion as Exhibit E to Attachment A. The Court further finds that the Respondents reserve their right to appeal if the judgment is reinstated or the new Judgment is entered. The Court further finds that the motion should be granted.

It is therefore, ORDERED, ADJUDGED, and DECREED that the judgment entered by this Court on August 22, 1990, in the above-styled and numbered cause be, and the same hereby is, vacated subject to being reinstated if the Respondents fail to perform the requirements of the Agreement attached to the motion as Attachment A, or, in the alternative, if the Court determines that the Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment, the entry of the new judgment attached to the motion as Exhibit E to Attachment A.

SIGNED and ENTERED this 14th day of November, 1991.

/s/
JUDGE JOSEPH HART
250th Judicial District

APPROVED AS TO FORM AND SUBSTANCE:

NUECES COUNTY ATTORNEY
Nueces County Courthouse
901 Leopard, Room 206
Corpus Christi, Texas 78401-3680
(512) 888-0206

By: /s/
Carlos Valdez
State Bar No. 20426250

ATTORNEYS FOR NUECES COUNTY

BICKERSTAFF, HEATH & SMILEY
98 San Jacinto Blvd., Suite 1800
Austin, Texas 78701-4039

By: /s/
Ann Clarke Snell
State Bar No. 18788500

By: /s/
Steve Bickerstaff
State Bar No. 02293800

ATTORNEYS FOR INTERVENORS

ATTORNEY GENERAL OF TEXAS
DAN MORALES

WILL PRYOR
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ATTORNEYS FOR RESPONDENTS

APPENDIX GG

SETTLEMENT AGREEMENT IN HARRIS COUNTY, ET AL. V. THE STATE OF TEXAS, ET AL., NO. 475,468 IN THE 126TH DISTRICT OF TRAVIS COUNTY, TEXAS

AGREEMENT

WHEREAS, overcrowding in the Institutional Division of the Texas Department of Criminal Justice, and its predecessor, the Texas Department of Corrections (hereinafter collectively referred to as the "Institutional Division") has contributed to the cost to the Plaintiff/Relator Harris County and the Intervenor Montgomery County (hereinafter sometimes referred to as the "Counties") of confining persons who have received a judgment and sentence ordering confinement in the Texas Department of Criminal Justice following conviction of felony, revocation of probation, parole, or release on mandatory supervision for whom paperwork and processing required for transfer has been completed (hereinafter "state-sentenced inmates") prior to their transfer to the Institutional Division; and

WHEREAS, in the future Harris County and Montgomery County are likely to continue incurring the costs of confining state sentenced inmates prior to their transfer to the Institutional Division; and

WHEREAS, House Bill 93 of the Seventy-Second Legislature in the Second Called Session (hereinafter "H.B. 93") has been offered as a mechanism whereby the information of the criminal justice system can begin to take place while, in the meantime, providing partial compensation to Harris County and Montgomery County for confining state-sentenced inmates prior to their transfer to the Institutional Division; and

WHEREAS, the parties desire to settle and compromise the judgment obtained by Harris County and Montgomery

County against the Respondents in Harris County v. State of Texas, et al, cause number 475,468 in the 126th Judicial District Court of Travis County, Texas (hereinafter the "suit"); and

WHEREAS, the parties desire to reach an agreement in the suit which would be enforceable in the courts, but would not, unfairly, limit the ability of the State of Texas to operate and/or reform the criminal justice system;

NOW, THEREFORE, in order to induce Harris County and Montgomery County to settle and compromise the judgment obtained by Harris County and Montgomery County in the suit, the Respondents agree to:

1. Not later than the 32nd day after the effective date of Article 11 of H.B. 93 or the signing of this Agreement, whichever is later, the Texas Commission on Jail Standards (hereinafter the "TCJS") shall determine for the county jails of Harris County and Montgomery County, the number of inmates confined in the jail and confined in another county jail at a cost to the County on April 1, 1991, who were awaiting transfer to the Institutional Division following conviction of a felony, revocation of probation, parole or release on mandatory supervision, and for whom paperwork and processing required for transfer had been completed on that date. Harris County and Montgomery County are entitled to payment from the TCJS as compensation to the Counties for confining the number of inmates determined as ready for transfer under Section 499.123 of the Government Code, as amended by H.B. 93, at an amount per inmate to be determined by dividing into $11.5 million the total number of inmates as determined by the provisions of Section 499.123(b) of the Government Code, as amended by H.B. 93.

In the event Harris County or Montgomery County has not made a record of the date the transfer paperwork required by Article 42.09 of the Code of Criminal Procedure was completed, they may use the date the judgment and sentence was signed by

a Judge. However, for purposes of payment under other provisions of the Agreement, Harris County and Montgomery County agree and are required to maintain a permanent record of the date the paperwork provided for by Article 42.09 of the Code of Criminal Procedure was completed and the inmate became eligible for transfer to the Institutional Division.

The TCJS shall make the payment under this subsection on or before January 15, 1992.

2. Not later than September 10, 1993, the TCJS shall determine for the county jails of Harris County and Montgomery County, the number of inmates confined in the jails on September 1, 1993, who were awaiting transfer to the Institutional Division following conviction of a felony, or revocation of probation, parole or release on mandatory supervision, and for whom paperwork and processing required for transfer had been completed on that date. Harris County and Montgomery County are entitled to payment from the TCJS as compensation to the Counties for confining the number of inmates determined as ready for transfer under this section at an amount per inmate to be determined by dividing into $11.5 million the total number of inmates as determined by the provisions of Section 499.123(d) of the Government Code, as amended by H.B. 93.

The TCJS shall make the payment under this subsection on or before January 15, 1994.

3. From the effective date of H.B. 93 until August 31, 1993, for each month in which the number of inmates confined in the Harris County or Montgomery County jail and confined in another county jail at a cost to Harris County or Montgomery County awaiting transfer to the Institutional Division following conviction of a felony, revocation of probation, parole or release on mandatory supervision for whom paperwork and processing required for transfer has been completed, as determined under Section 499.122 of the Government Code, as amended by H.B.

93, is greater than 50 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123 of the Government Code, as amended by H.B. 93, the TCJS shall pay to Harris County or Montgomery County for each inmate in excess of 50 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmates in excess of 210 percent of the April 1, 1991, number, for each day of confinement the sum of $30.

4. From September 1, 1993, until September 1, 1995, for each month in which the number of inmates confined in the Harris County or Montgomery County jail and confined in another county jail at a cost to Harris County or Montgomery County awaiting transfer to the Institutional Division following conviction of a felony, revocation of probation, parole or release on mandatory supervision for whom paperwork and processing required for transfer has been completed, as determined under Section 499.122 of the Government Code, as amended by H.B. 93, is greater than 25 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123 of the Government Code, as amended by H.B. 93, the TCJS shall pay to Harris County or Montgomery County for each inmate in excess of 25 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmate in excess of 210 percent of the April 1, 1991, number, for each day of confinement the sum of $30.

5. If a state or federal court determines that conditions in the Harris County or Monomer County jail are unconstitutional, and if on or after October 1, 1991, the percentage of inmates in the jail awaiting transfer to the Institutional Division is 20 percent or more of the total number of inmates in the jail, the TCJS shall transfer inmates from the jail to an appropriate jail, detention center, work camp, or correctional facility, but only to the extent necessary to bring Harris County or Montgomery County into compliance with court orders or to reduce the

percentage of inmates in the jail awaiting transfer to the Institutional Division to less than 20 percent of the total number of inmates in the jail. The TCJS is liable to the Counties for payment of the costs of transportation for and maintenance of transferred inmates. The costs for maintenance of an inmate for which the TCJS is liable under this section are the actual costs, as determined by the agreement between the Texas Board of Criminal Justice (hereinafter the "TBCJ") and the officer or governing body authorized by law to enter in contracts. No payments will be withheld unless the TBCJ determines that Harris County or Montgomery County is not reasonably utilizing its available certified jail beds, and then only to the extent necessary to equal the cost of unutilized beds.

6. Payments made to Harris County and Montgomery County pursuant to the provision of paragraphs one and three shall be made by the TCJS from a special funds of at least $56,982,500 appropriated for that purpose for all counties of the State in the 1992-93 legislative biennium.

7. Payments made to Harris County or Montgomery County pursuant to the provision of paragraphs two and four shall be made by the TCJS from a special fund of at least $56,982,500 appropriated for that purpose for all counties of the State in the 1994-95 legislative biennium.

8. Nothing in this Agreement shall be construed to limit the Legislature's ability or responsibility to appropriate additional amounts for purposes of payments provided for in H.B. 93 or to limit the Counties' ability to enforce the provisions of H.B. 93 in a proceeding outside this suit.

9. Respondents agree to begin planning and construction of thirteen thousand three hundred (13,300) additional prison beds in the legislative biennium of 1992-93 with funds appropriated for that purpose by the Legislature. Respondents further agree (i) to begin construction of an additional twelve thousand (12,000) drug treatment beds in the 1992-93 biennium or (ii) to

being construction of at least an additional three thousand (3,000) drug treatment beds in the 1992-1993 legislative biennium and to begin construction of at least nine thousand (9,000) additional prison beds in the TDCJ system during the 1994-1995 legislative biennium. This obligation will be in addition to the obligation of the Respondents to complete construction and begin operation, in the legislative biennium of 1992-93, of the fifteen thousand (15,000) prison beds, for which funds have already been appropriated or obtained. The obligation to begin planning and constructing of the additional twenty-five thousand three hundred (25,300) prison and/or drug treatment beds during the 1992-93 biennium is contingent on the approval of the voters of S.J.R. No. 4, 72nd Legislature, 1st Called Session. However, no other provisions of this agreement, including, but no limited to, the provisions in paragraph 11, shall be contingent on the approval of the voters of S.J.R. No. 4, 72nd Legislature, 1st Called Session.

10. Respondents and the Counties agree that both parties have important roles and responsibilities in the efficient operation of the criminal justice system. Respondents acknowledge that the Institutional Division has the responsibility to accept state-sentenced inmates within a reasonable time once their paperwork and processing required for transfer has been completed. This agreement reflects an effort by both Respondents and the Counties to provide a framework within which the backlog of state-sentenced inmates in county jails can be cooperatively and successfully addressed over the term of this Agreement. Respondents and the Counties agree that it is their mutual objective to achieve a criminal justice system in which state sentenced inmates are admitted to the Institutional Division within a period less than 45 days after they are ready for transfer. In furtherance of that objective, this Agreement shall terminate prior to September 1, 1999, if Respondents accept state-sentenced inmates, on an average over one year, not later than the 15th day after the date on which all processing required for transfer has been completed. Respondents and the Counties agree that nothing in this Agreement shall be construed as an

acknowledgment, admission or acceptance by the Respondents of an obligation, duty or requirement to accept sooner than the 45th day after the date on which all processing required for transfer has been completed for an inmate confined in a county jail while under an order of commitment to the Institutional Division and that this paragraph is not intended to be an admission of liability in this suit, or in any other suit, and shall be of no effect in any further legal proceedings between Respondents and the Counties, or any other entity.

11. Respondents agree that on and after September 1, 1995, the Institutional Division will accept, no letter than the 45th day after the date on which all processing required for transfer has been completed, each inmate confined in a county jail while under an order of commitment to the Institutional Division.

12. Nothing in this Agreement shall be construed as an acknowledgment, admission, or acceptance by Harris County or Montgomery County of the reasonableness of a 45 day period prior to transfer of state-sentenced inmates to the Institutional Division. Nothing in this Agreement shall be construed as an acknowledgment, admission or acceptance by Harris County or Montgomery County of the reasonableness or constitutionality of the policy or practice of limiting the number of state-sentenced inmates being transferred to the Institutional Division to the number prescribed by the allocation formula.

13. Nothing in this Agreement shall be construed so as to require or obligate Respondents to increase the operational capacity of the Institutional Division as provided in paragraph 9 if Respondents can demonstrate that it is not necessary to increase operational capacity in order to, after September 1, 1995, accept, not later than the 45th day after the date on which all processing required for transfer has been completed, each inmate confined in a county jail while under an order of commitment to the Institutional Division.

14. The parties agree to execute the Agreed Motion to Vacate Judgment, Agreed Order Vacating Judgment, and Judgment attached hereto as Exhibits A, B, and C.

15. The parties agree to file the Agreed Motion to Vacate Judgment and Agreed Order Vacating Judgment attached as Exhibits A and B in the 126th Judicial District Court of Travis County, Texas.

The parties agree that the 126th Judicial District Court of Travis County, Texas, (hereinafter the "trial court") in this matter shall have continuing jurisdiction to determine whether the parties have complied with the provisions of this settlement Agreement.

In the event of the Respondents' nonperformance, Harris County and/or Montgomery County may move for reinstatement of the vacated judgment. If the trial court determines that the Respondents have violated the terms of this Agreement, the judgment will be reinstated and judgment will be entered for Harris County and/or Montgomery County. The amount due under the judgment will include the amounts due Harris County and/or Montgomery County as of April 30, 1991, as stated in the judgment, and the amounts due the Counties for confining state-sentenced inmates between May 1, 1991, and the date the judgment is reinstated, plus interest at the rate of ten percent (10%). The formula provided in the judgment for determining the amount of compensation due the Counties will be used in determining the amount due for the period from April 30, 1991, until the date the judgment is reinstated. Respondents will be entitled to an offset against the judgment amount for the amounts paid under this Agreement prior to the reinstatement of the judgment. The Respondents reserve their right to appeal the judgment if it is reinstated.

16. The parties agree that if the trial court determines that the Respondents have violated the terms of this Agreement, and the trial court determines that it is unable to reinstate the

judgment as provided for in paragraph 15, the parties agree that the new Judgment, attached hereto as Exhibit C, will be presented to the trial court for entry. Respondents will be entitled to an offset against the Judgment for the amounts paid under this Agreement prior to the entry of the Judgment. The Respondents reserve their right to appeal the judgment after it is entered.

17. If the vacated judgment is reinstated or the new Judgment is entered, Respondent's obligations pursuant to this Agreement are terminated.

18. It is agreed that the penalty for non-compliance with the Agreement by Respondents is reinstatement of the judgment rather than specific performance of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 of this Agreement or contempt sanctions. It is agreed that paragraphs 14, 15, 16, 17, 18, 19, 20, and 21 of the Agreement may be enforced by an action for specific performance.

19. It is agreed that the signing of this Agreement constitutes a written agreement that settles the suit as required by Sections 499.121 and 499.126 of the Government Code, as amended by H.B.93.

20. It is agreed that this Agreement is contingent on the Court of Appeals remanding the suit to the trial court for further proceedings, if necessary, and the trial court entering the Agreed Order Vacating Judgment attached hereto as Exhibit B.

21. This Agreement shall terminate September 1, 1999, unless a motion to reinstate the judgment has been filed or the judgment has been reinstated pursuant to the provisions in paragraph 15 above or the Judgment has been entered pursuant to the provisions in paragraph 16, in which case it terminates on reinstatement of the vacated judgment or entry off the new Judgment. It is further agreed by all parties herein that upon termination of the Agreement, other than by reinstatement of the

vacated judgment or entry of the new judgment, Harris County and Montgomery County will file a motion to dismiss with prejudice in the trial court.

22. The negotiation of the terms of this document shall not be admissible as evidence to prove intent of the parties or for any other purpose in any proceeding. This shall include but not be limited to previous drafts of this agreement, letters between the parties, oral statements by the parties in the negotiation of this document or any other communication between the parties.

The attorneys of record for the parties have hereunto signed their names with full power to bind their respective clients to this Agreement.

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APPENDIX HH

EXCERPTS FROM PLAINTIFFS'-APPELLEES' BRIEF (pp. 65-72) IN *ALBERTI, ET AL. v. THE SHERIFF OF HARRIS COUNTY, ET AL., v. ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL.*, FIFTH CIR. NOS. 91-2274-91-2210, 90-6034, 90-2441

h. Certification To Texas Supreme Court

If Judge Hart's rulings are not entitled to preclusive effect until they are set aside on appeal, then the proper procedure for this court to follow to respect the state's interest in obtaining state court resolution of state law issues while vindicating plaintiffs' constitutional rights, and the authority of federal courts to redress constitutional deprivations, would be for this court to certify to the Texas Supreme Court any unresolved questions of Texas law. Plaintiffs further submit that the court should certify certain state law questions to the Texas Supreme Court for the additional reason that, as a practical matter, no final resolution of this protracted litigation can ultimately be achieved until those issues are decided by the Texas courts. Certification presents the greatest promise for the quickest definitive resolution of these issues, thereby speeding considerably the date on which this tortuous litigation can finally come to an end.

At this point, three things are indisputably clear: (1) the Harris County jails are massively, unconstitutionally overcrowded; (2) there are sufficient cells available in other county jails throughout the state to alleviate the problem (at least for the time being); and (3) the only question is whether, and to what extent, state officials should be required to participate in paying for that temporary remedy (utilization of vacant cells in other counties) or otherwise assisting in the abatement of ongoing constitutional violations in the jails.

This case has been pending for over eighteen years. Yet, nobody disputes the fact that the mandates of the consent decree entered more than sixteen years ago still have not been achieved. Neither have the requirements of the supplemental orders entered by the district court in accordance with the reserved powers retained in the consent decree. Most importantly, no one denies that the Harris County detention facilities are currently grossly unconstitutional as a result of severe overcrowding. The only real issue at this point is whether, and to what extent, state officials have a duty to participate in eliminating these undeniably unconstitutional conditions.

While it is clear the county defendants have an obligation to eradicate unconstitutional conditions in the Harris County jails, it is less certain how much responsibility the state defendants bear, under state law, to participate in rectification of the problem by either removing state-ready inmates promptly from Harris County jails or paying the county for the cost of housing excess populations elsewhere.

Once a constitutional violation has been shown to exist, as it has in this case, the court must look to state law to determine which governmental officials are responsible for remedying the deficiency. *Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986); *In Re Clements*, 881 F.2d 145, 154-155 (5th Cir. 1989). It is common ground in this case (and indeed, indisputable) that the county defendants have affirmative obligations under (a) the consent decree, (b) the constitution, and (c) state law, TEX. LOCAL GOV'T. CODE §§ 351.001 and 351.041; *In Re Clements*, 881 F.2d at 154; *Bush v. Viterna*, 795 F.2d at 1206, to provide and pay for constitutional jails for all persons confined in their facilities until they are transferred to the custody of the state defendants. The unresolved question here is whether, and to what extent, state officials also bear responsibility for rectifying unconstitutional conditions in illegally overcrowded county jails housing state-ready prisoners by promptly removing from such facilities inmates who have been sentenced to serve time in the custody of the Texas

Department of Criminal Justice - Institutional Division and are ready for transfer to state custody (or paying for the housing of such inmates elsewhere).

The reason there is uncertainty about this issue is that the Texas courts have not yet finally ruled on the meaning or scope of the Comprehensive Criminal Justice Reform Act passed by the legislature in 1989, TEX. GEN. & SPECIAL LAWS 1989, Reg. Sess. ch. 785, pp. 3470-3558 (H.B. No. 2335) in this context. Prior to September 1, 1989 (the effective date of H.B. 2335), Texas law had traditionally recognized a rather bright line dichotomy concerning the responsibilities of county and state officials for the housing of felony offenders: before conviction, such prisoners were the responsibility of county officials (the sheriff and the commissioners court); upon being sentenced to serve penitentiary time, the inmates were to be "speedily" transferred to the Texas Department of Corrections, TEX. REV. CIV. STAT. ANN. art 6166r (Vernon 1970) and became the responsibility of the state. Thus, prior to enactment of H.B. 2335, state law effectively vested exclusive responsibility for the constitutional housing of convicted felons in state officials.

In 1989, the Texas legislature fundamentally revised the relationship between the state and the counties with regard to the housing of convicted felons. While the TDCJ-ID[48] still has "primary" responsibility for the housing of convicted felons, TEX. REV. CIV. STAT. ANN. art 44113(401) § 1.02(a)(1) (Vernon Supp. 1991), there appears to have been a significant change in the extent of the state's duty to house such inmates. In the first place, the requirement that convicted felons be transferred to the TDCJ-ID "speedily" has been deleted from state law. More importantly, an elaborate mechanism, grounded in a complex formula, has been established to "allocate" among all the counties of Texas the finite number of prisoner spaces available within the TDCJ-ID. TEX. REV. CIV. STAT. ANN. art 6166a-4 (Vernon 1991). Each county is permitted to send to

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48 That is the new name for what used to be called the Texas Department of Corrections (TDC).

the TDCJ-ID a certain number of inmates each week, and that number is determined by a detailed formula devised by the legislature and implemented by the county defendants (the members of the Texas Board of Criminal Justice).

Recognizing that the number of admissions "allocated" to the counties would invariably be less than the numbers of persons historical sentenced to TDC, the legislature created a spectrum of intermediate sanctions[49] which the district courts could utilize in lieu of TDCJ-ID incarceration, and the state provided substantial funds to the counties to finance, at the local level, those alternatives to institutionalization in the penitentiary.[50]

Thus, on the face of it, Texas appears to have decided in 1989 to limit state responsibility for accepting sentenced inmates from the counties to the numbers derived from the allocation formula, to provide funds to the counties to pay for alternative intermediate sanctions, and to require the counties to bear the financial burden of housing any more prisoners in their facilities, including so-called state-ready inmates, themselves.

Not surprisingly, the counties balked at the state's apparent effort to shift a portion of the traditional burden of paying for the housing of state-ready inmates to the local governments. Two lawsuits were filed in state district court in Travis County asserting, in essence, that the state still has responsibility to remove state-ready prisoners promptly from the county jails, or to pay the counties the cost of incarcerating them in local facilities pending transfer to the TDCJ-ID, even after enactment of H.B. 2335. *County of Nueces v. Texas Board of*

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49 Boot camps, super-intensive probation, residential probation centers, and electronically monitored home detention are examples of the kinds of intermediate, non-penitentiary punishments specifically sanctioned by the legislature.

50 The statewide budget for funding H.B. 2335 programs from September 1, 1990 through August 31, 1991, was $50 million. Harris County's share of that fund was approximately $10 million.

Corrections, No. 452,071 (Dist. Ct. of Travis Co., 126th Judicial Dist. of Tex.); *Harris County v. State of Texas*, No. 475,468 (Dist. Ct. of Travis Co., 126th Judicial Dist. of Tex.). In both of those cases, state district court Judge Joseph Hart ruled in favor of the counties and concluded that the state officials continue to have a duty, under Texas law, even after passage of H.B. 2335, to take all convicted felons from the counties promptly or pay for the cost of housing state-ready inmates in local facilities.[51] In essence, the state defendants must either "take or pay" according to Judge Hart.

Ever since enactment of H.B. 2335, uncertainty concerning its meaning and the extent to which it relieved state officials of responsibility for state-ready prisoners, have prevented comprehensive resolution of the *Alberti* case. Everybody acknowledges that Harris County detention facilities are unconstitutional due to massive overcrowding. The state defendants claim, however, that the sole responsibility to cure those deficiencies rest wholly with county officials (as a result of enactment of H.B. 2335), while the county defendants unswervingly insist that since the current overcrowding is in large part the result of the state defendants' failure promptly to remove state-ready prisoners from the local jails, the state should effect the remedy, notwithstanding passage of H.B. 2335.[52]

This routine has gone on for more than a year and a half now. At every opportunity, the state defendants cite the passage from *Bush v. Viterna*, 795 F.2d at 1209, to the effect that the

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51 The Nueces County case is winding its way through the state appellate system. The state's opening brief was filed on March 29, 1991; the appellees' brief will be due on April 29, 1991, if no extension of time is requested or granted. In the Harris County case, Judge Hart granted summary judgment in favor of the county as to liability. Since the parties have been unable to agree to the per diem costs of incarcerating prisoners in Harris County, trial on that "damages" issue has been set for May 13, 1991.

52 The county defendants argue that, other than providing a few dollars for some locally based programs, H.B. 2335 really did not effectuate a significant change in prior law concerning the state's traditional responsibility with regard to state-ready prisoners.

state has "virtually complete freedom to decide who will be responsible" for discharging constitutional obligations, and claim that the legislature, in enacting H.B. 2335, did just that and opted to delegate to the counties exclusive responsibility for the housing of state-ready inmates in constitutional facilities (at least until there is room in the ID to accept them into state custody), and assert that, therefore, they have been relieved, by state law, from any duty to participate in effectuating a remedy for the admittedly unconstitutional conditions in the Harris County jails. Invariably, the county defendants respond that the state officials misapprehend the real meaning and import of H.B. 2335 and that state officials are still primarily obligated, under Texas law, to remove state-ready inmates promptly from the Harris County jails, at least where leaving the prisoners in that terribly overcrowded facility subjects them to unconstitutional privations and violates rights secured by the eighth and fourteenth amendments to the constitution of the United States.

Meanwhile, plaintiffs languish in horrible conditions which no one suggests comport with constitutional standards and no one denies pose serious threats to the health, safety, welfare, and, indeed, lives of the inmates condemned to be warehoused there, as well as the public at large.

It is apparent that no real, final comprehensive remedy will be achieved in this case until the Texas courts sort out the uncertainties existing in Texas law and determine definitively, and decisively, the scope of the state officials' responsibility, under Texas law, to remove state-ready prisoners from unconstitutional county jails. Until that state law determination is made, this litigation is, effectively, on a tread mill and no permanent solution to this protracted case and the seemingly never-ending problems of overcrowding in the Harris County jails can realistically be effected.

Accordingly, plaintiffs propose that this court certify to the Texas Supreme Court, under TEX. R. APP. P. 144 and TEX. CONST. 145 V § 3-c, the following questions:

a. Does Texas law impose on state (as opposed to county) officials a duty promptly to remove from unconstitutionally overcrowded county jails prisoners who have been convicted of felony offenses and sentenced to serve time in the custody of the Texas Department of Criminal Justice-Institutional Division in excess of the numbers of inmates required to be accepted into the TDCJ-ID weekly pursuant to the allocation formula promulgated pursuant to TEX. REV. CIV. STAT. ANN. art 6166a-4 (Vernon 1991)?

b. Assuming that the answer to the foregoing question is yes, does Texas law require or authorize funds from the state treasury to be utilized to pay the cost of housing excess state-ready prisoners in available cells in county jails, where state officials have declined (or are unable) to receive such inmates into the TDCJ-ID as a result of that facility being populated to the maximum extent allowed by law?

Those questions are decidedly ones which should be addressed by the Texas Supreme Court in the first instance. There is obviously no clearly controlling Texas precedent (other than Judge Hart's rulings, which are on appeal or interlocutory), and the matters are truly issues of first impression in this state. The principles of comity and federalism counsel in favor of permitting the courts of the state of Texas the opportunity to answer these crucial issues of state law, instead of the federal courts trying to divine what Texas courts might ultimately do with them so long as plaintiffs' constitutional rights are not continually violated in the meantime (i.e. federally ordered relief proceeds).

If the certification process has any role in preserving the federal-state balance, certainly this case presents the ideal occasion for the federal court to seek definitive guidance from the highest court of the state on these state law questions in

these areas of such great importance to the public policy and interest of the state.[53]

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53 Of course, referral of these questions to the Texas Supreme Court must not delay relief to the plaintiff class in any respect. Rather, the court should command the district court to order the defendants to take whatever steps are necessary to achieve needed reductions in county jail populations, including housing excess populations in vacant cells in other counties, even while the certification process is going on. No principle of comity or federalism, or other consideration, would permit the intolerable conditions currently existing in the Harris County jails to continue and persist while the Texas Supreme Court sorts out the unsettled questions of Texas law concerning which level of government (state or county) should pay for the remedy.

APPENDIX II

S.B. 24, 1ST CALLED SESSION, 72ND TEXAS LEGISLATURE (1991) UNAPPROVED CONFERENCE COMMITTEE REPORT (IN PERTINENT PART)

A BILL TO BE ENTITLED

S.B. No. 24

AN ACT

relating to the efficient operation of the state criminal justice system, including the punishment of offenses, probation and parole, criminal justice services and facilities, and the issuance of general obligation bonds for acquiring, constructing, or equipping certain of those facilities.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

[p 1]

* * * * *

SECTION 14.02. Chapter 499, Government Code, as revised by Chapter 16, Acts of the 72nd Legislature, Regular Session, 1991, is amended by adding Subchapter F to read as follows:

SUBCHAPTER F. PROCEDURES FOR REDUCING COUNTY JAIL BACKLOG

[p. 32]

* * * * *

Sec. 499.123. PAYMENT * * * * *

(b) The Commission on Jail Standards shall pay the actual costs incurred by a qualifying county for the transfer of inmates from the county jail to other correctional facilities, for the period beginning on February 7, 1991, and ending on October 1, 1991, if the inmates are transferred after a determination by a court that conditions are unconstitutional or if during that period the percentage of inmates in the jail awaiting transfer to the

institutional division was 20 percent or more of the total number of inmates in the jail at any time.

[p. 34]

* * * * *

Sec. 499.125. TRANSFER OF FELONY BACKLOG. (a) If a state or federal court determines that conditions in a county jail are unconstitutional, and if on or after October 1, 1991, the percentage of inmates in the jail awaiting transfer to the institutional division is 20 percent or more of the total number of

[p. 35]

inmates in the jail, the commission shall transfer inmates from the jail to a qualified jail, detention center, work camp, or correctional facility, but only to the extent necessary to bring the county into compliance with court orders or to reduce the percentage of inmates in the jail awaiting transfer to the institutional division to less than 20 percent of the total number of inmates in the jail.

[p. 36]

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